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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 113.

THE SAN JOSE LAND AND WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE SAN JOSE RANCH COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED [illegible]

(14,461)

(18,195.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM 1901.

No. 342.

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THE SAN JOSE LAND AND WATER COMPANY,
PLAINTIFF IN ERROR,

*vs.*

THE SAN JOSE RANCH COMPANY.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 In the Supreme Court of the State of California.

SAN JOSE LAND AND WATER COMPANY, Plaintiff and Appellant,
*vs.*
SAN JOSE RANCH COMPANY, Defendant and Respondent.
} L. A., No. 858.

Appeal from superior court of the county of Los Angeles—W. H Clark, judge.

*Transcript on Appeal.*

Anderson & Anderson and R. Dunnigan, attorneys for plaintiffs and appellants.

John S. Chapman, attorney for defendants and respondents.

Filed December 2nd, 1899.

GEO. W. ROOT, *Clerk*,
By H. G. SIMPSON,
*Deputy Clerk.*

2 In the Superior Court in and for Los Angeles County, State of California.

SAN JOSE LAND AND WATER COMPANY, Plaintiff,
*vs.*
SAN JOSE RANCH COMPANY, Defendant.

*Complaint.*

Plaintiff complains of defendant and alleges:

I.

That the plaintiff is, and — all the times hereinafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of California.

II.

That the defendant is, and — all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California.

III.

3 That the plaintiff is now and for a long time hitherto has been, the owner of that certain lot piece or parcel of land, situate, lying and being in the county of Los Angeles, State of California, and bounded and described as follows, to wit:

Being the east half of the northwest quarter of section twenty-five, township 1, N. R. 9, W., S. B. M.

IV.

That the defendant claims an estate or interest in said land adverse to the said plaintiff.

V.

That the claims of said defendant *is* without any right whatever, and that said defendant has not any estate or title or interest in said estate or any part thereof.

Wherefore plaintiff prays:

1. That the defendant may be required to set forth the nature of its claims, and that all adverse claims of the defendant may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that defendant has no estate or interest whatever in or to said land or premises, or any part thereof, and that the title of plainiiff thereto is good and valid.

3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to said plaintiff, and that plaintiff recover possession of said land from the defendant, and for such other and further
4 relief as to this honorable court may seem meet and agreeable to equity and for costs of suit.

R. DUNNIGAN &
ANDERSON, FITZGERALD & ANDERSON,
*Attorneys for Plaintiff.*

Endorsed: Filed Apr. 3, 1889, Chas. H. Dunsmor, clerk, by F. B. Fanning, deputy.

(Title of Court and Cause.)

*Amended Answer.*

Now comes the defendant and by leave of the court first obtained, files this its amended answer to the complaint herein, and for a first defense.

I.

1. Denies that the plaintiff is now, or ever was the owner of the land described in the complaint, and being the east half of the northwest quarter of section 25, township 1 north, range 9 west, S. B. M., or any part thereof.

2. The defendant denies that it claims any interest in the said property described in the complaint, excepting the right to maintain a dam in the San Dimas creek at a point about one hundred yards northerly from the center of said section 25, and to maintain pipes connecting with the said creek at the said dam for the purposes of conducting the waters of the said creek to lands below the said section 25, for the purposes of irrigation and for domestic use; and that, as to the said claim of the defendant, the defendant denies

that said claim is without right, but, on the contrary avers
5 that its said claim of right to maintain the said dam and the said pipes, and to conduct the water therethrough, is valid.

II.

For a further and second defense, the defendant avers that the plaintiff's cause of action is barred by the provisions of section 318 of the code of civil procedure of the State of California.

III.

For a further and third defense, the defendant avers:

1. That, some time in the year 1868, one J. W. Hanes settled upon a certain tract of land in the mouth of the San Dimas canyon, in the county of Los Angeles, and near the center of said section 25, township 1 north, range 9 west, claiming the same for the purposes of cultivation and grazing; and on the 23rd day of September, 1870, caused to be recorded in the office of the county recorder of Los Angeles county a pos-es-ory claim under an act of the legislature of the State of California entitled, "An act prescribing the mode of maintaining and defending pos-essory actions on the public lands in the State of California," approved April 20th, 1852, and the acts supplemental thereto and amendatory thereof, setting forth, in his affidavit claiming the same, that the lines of the tract so claimed, did not embrace more than one hundred and sixty acres of land, and that he held no other claim under the said act, and to the best of his knowledge and belief, that the said lands were not
6 claimed under any existing title, and giving in the said statement and claim a description of the said tract so claimed by him, and which said claim was duly verified before J. W. Gillette, a deputy county clerk of the county of Los Angeles.

2. That the said J. W. Hanes was, at the time of filing of his said pos-essory claim, a citizen of the United States, and at the time of locating the said claim and filing the said statement and affidavit, the said claimant had marked by metes and bounds the said tract of land, so that the bound-ries might be readily traced, and had entered into the occupation of said claim, and was at the date of the occupation of said claim in the actual occupancy of said tract of land.

3. That the said J. W. Hanes, at the same time, claimed the waters of the San Dimas creek for the purpose of irrigation and domestic uses, and had prior to that time entered upon the said creek about one hundred yards north of the north bound-ry of his said claim, and about one hundred yards north of the north bound-ry of the southeast quarter — said section 25, and about twenty feet west of the north and south line through the center of said section, and constructed in said creek a dam, and constructed a ditch connected with the said creek at a point immediately above the said dam, and extending down to and upon the said tract of land so claimed by him, for the purpose of diverting the waters of said stream, and by means

of said dam and ditch did divert the waters of said stream to
7 and upon the land so occupied by him, and used the same for the purposes of irrigation and domestic uses.

4. That the said ditch and the pipes subsequently laid along the course thereof have been continuously used by the defendants and its grantors and predecessors from the said time in 1870 down to the commencement of this action, for the purpose of diverting the said waters of said stream for use as aforesoid, upon the said lands and other lands in the vicinity of the said southeast quarter of section 25 aforesaid.

5. Defendant further avers that at the time of the location of the said lands by the said Hanes, and the appropriation of the said waters, the said section 25 was unsurveyed public lands of the United States; and defendant further avers that it has succeeded, by mesne conveyance, to all the right, title and interest of said J. W. Hanes in and to the said dam, ditches, pipes, rights of way and easements upon said section 25, and it and its grantors and predecessors have, ever since the year 1870, been in the open, notorious, exclusive, uninterrupted and adverse use of the said dam, ditches and pipes, using the same for diverting the waters of the said creek for the purposes aforesaid, under a claim of right, and adversely to the plaintiff and to the whole world. And defendant further avers that the right to maintain the said dam and the said pipe and ditches and the right to conduct the water from the said stream at the point where the said dam is constructed to the said southeast quarter of section
25 aforesaid, and the lands in the vicinity thereof, is the only
8 right claimed by the defendants in the said east half of the northwest quarter of said section 25.

Wherefore, defendant prays that it be adjudged that plaintiff take nothing by its suit, and that the defendant has the right to maintain the said dam and the said pipe and ditches, and to conduct the waters of the said San Dimas creek as aforesaid, and that it recover its costs and such other and further relief as may be just.

A. W. CHAPMAN & HENDRICK,
*Att'ys for Def'd't.*

Endorsed: Received copy of the within this 21 day of May, 1890, and consent that it may be filed. Anderson, Fitzgerald & Anderson, R. Dunnigan, attorneys for pl'ffs. Filed May 21, 1890. Chas. H. Dunsmoor, clerk; by D. E. Adams, deputy.

(Title of Court and Cause.)

*Findings of Fact.*

Upon the evidence, oral and documentary, introduced by plaintiff and defendant at the trial of the above-entitled action, and upon the several stipulations signed by plaintiff and defendant and filed herein, the court now makes the following findings of fact, to wit:

I.

The plaintiff, The San Jose Land & Water Company, is a corporation duly incorporated and organized under the laws of
9 the State of California.

II.

The San Jose Ranch Company is a corporation duly incorporated and organized under the laws of the State of California.

III.

That a corporation entitled "Southern Pacific Railroad Company" was organized under the laws of the State of California by articles of incorporation dated December 9th, 1865, for the purpose of constructing and operating a railroad from a point on the bay of San Francisco in said State, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Los Angeles, and San Diego, to the eastern line of said State of California. Said company was not authorized by its articles of incorporation, nor by the laws of the State of California to construct a railroad from Tehachapi by way of Los Angeles to the Colorado river.

IV.

Said company did accept the grants, rights, and franchises granted by the act of Congress of March 3rd, 1871, and entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and did, on April 3rd, 1871, pursuant to said act, file in the office of the Commissioner of the General Land Office its map of location.

V.

On the 12th day of August, 1873, a corporation was organized under the laws of the State of California by the consolida-
10 tion of the Southern Pacific Railroad Company and the Southern Pacific Branch Railroad Company, by articles of incorporation dated the said 12th day of August, 1873. Said articles did provide for the formation of a new corporation to be known as the Southern Pacific Railroad Company, with a capital stock of ninety millions of dollars in lieu and stead of a capital stock of seventy millions of dollars as provided for in the articles of December 9th, 1865, and mentioned in paragraph numbered III of these findings, and did provide for the issue of new stock and the surrender of the stock held in the old and contracting companies, and for the transfer to the said newly incorporated company of all the rights, franchises and property of said companies.

VI.

Said consolidation and transfer was actually made and said newly organized corporation did between years 1874 and 1879, build and construct a railroad from Tehachapi pass by way of Los Angeles to Yuma, and said construction thereof has been accepted by the

President of the United States as having been done and made under and pursuant to said act of Congress of March 3rd, 1871.

VII.

Said company did select the east one-half of the northwest one-quarter of section twenty-five (25), township one (1) north, range nine (9) west, San Bernardino meridian, claiming that the same belonged to it under said act of Congress of March 3rd, 1871.

11

VIII.

Said described tract of land is within ten miles of the Southern Pacific railroad as shown by its location map filed pursuant to said act of Congress and is non-mineral land and is unpatented.

IX.

Said described tract of land is within the indemnity limits of the land grant to the Atlantic and Pacific Railroad Company by act of Congress of July 27th, 1866, as shown by its designated route of road-bed, filed in the office of the Commissioner of the General Land Office. Said Atlantic & Pacific Railroad Company never complied with the terms of said land grant and never built its said road.

X.

That on the 28th day of Febuary, 1887, the Southern Pacific Railroad Company and one W. D. Noland and one Jacob Heckenlively did enter into a contract, the terms and conditions of which are as follows, to wit:

"This agreement made at San Francisco, California, this 28th day of February, A. D. 1887, between the Southern Pacific Railroad Company, party of the first part, and W. D. Noland and J. Heckenlively of the county of Los Angeles, State of California, parties of the second part, witnesseth: That the party of the first part, in consideration of the covenants and agreements of the parties of the second part hereinafter contained, agrees to sell to the parties of the second part the following tract of

12 land situated in the county of Los Angeles, State of California, and known and designated on the public surveys of the United States as the northwest quarter of section 25 township one north, range 9 west, San Bernardino base and meridian, containing 160 acres of land, for the sum of $160 *dollars* gold coin of the United States. And the parties of the second part, in consideration of the premises agree to buy the land hereinbefore described and to pay to the party of the first part the said sum of $160 as follows, to wit: $32, and also $8.96 one year's interest in advance on the remainder, in United States gold coin of the present standard of value, on the execution of this contract (which two last-mentioned sums have this day been fully paid), and the remainder, to wit, the sum of $128, with interest thereon annually in advance at the rate of seven per cent. per annum both in the United States gold coin of the present standard of value, at its office in the city and county of

San Francisco, on or before the 28th of February, 1892; and also to pay all taxes and assessments that may at any time be levied or imposed upon said premises, or any part thereof, and if the parties of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same and all sums so paid by the party of the first part shall be added to and become a part of the unpaid remainder and shall bear interest at the same rate and
be paid in the same manner and at the same time and place
13 hereinbefore provided for the payment of said remainder and
the interest thereof. It is further agreed that upon the punctual payment of said purchase-money, interest, taxes and assessments, and the strict and faithful performance by the parties of the second part, their legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor, from the United States, upon demand and the surrender of this instrument, execute and deliver to the parties of the second part, their heirs and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land. It is further agreed that until the full payment of said purchase-money, interest, taxes and assessments no strip or waste shall be made on said premises, and that no wood or growing trees shall be cut thereon, except for necessary fuel for the family of the legal occupant under this contract, and for the erection of buildings or fences upon said land, without the previous, written consent of the party of the first part. It is further agreed that the parties of the second part may at once enter upon, take and hold possession of said premises, provided, however, that if the parties of the second part shall fail to make any of said payments of remainder or interest, taxes or assessments as herein provided, or shall fail to comply strictly with any of the stipulations of this contract, then this right shall cease and the
party of the first part, its successors or assigns may, without
14 notice, enter upon, take and hold possession of said premises
with the improvements thereon. It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as in consequence of circumstances beyond its control it sometimes fails to obtain patents for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to the said party of the first part for all or any of the tracts herein described, it will upon demand repay (without interest) to the parties of the second part all moneys that may have been paid to it by them on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part as per schedule on page three

hereof; that said lands being unpatented the party of the first part does not guarantee possession of them to the parties of the second part and will not be responsible to them for damages or costs in case of their failure to obtain and keep such possession. It is further agreed that if the party of the first part shall obtain patent for a part of the lands herein described and shall fail to obtain
15 patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained. It is further agreed that the parties of the second part will never deny that the tracts herein described or any part of them, are a part of said grant and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part, and that they will not obtain or hold possession of all or any of them adversely to said party of the first part. It is further agreed that this contract shall not be assignable, except by indorsement and with the written consent of the party of the first part and the written promise of the assignee to perform all the undertakings and promises of the parties of the second part as above set forth. It is further agreed that the parties of the second part shall pay three dollars for expenses of acknowledgment to the deed that shall be issued on this contract."

XI.

That both the said Noland and the said Heckenlively are native-born citizens of the United States and did enter into said agreement of purchase in good faith, believing that the Southern Pacific Railroad Company had by virtue of its said grant the right to sell said described tract of land. That said Noland and said Heckenlively made the first payment as called
16 for in said contract and the annual interest on the balance has been paid up to February 28th, 1892, and no other or further payments of interest or principal have been made. That at the time of the execution of said contract said tract of land was not in the *bona fide* occupation of any adverse claimant under the pre-emption or homestead laws of the United States and the same had not been settled upon at the date of said purchase or on the 3rd day of March, 1887, or subsequent to December 1st, 1882, by any person claiming to enter the same under the settlement laws of the United States. That neither the said Noland nor the said Heckenlively nor their assigns ever settled upon said described tract of land or cultivated or fenced the same or any part thereof, but the said Heckenlively did, under said agreement of purchase and shortly after the same was executed, enter upon said land and commence the construction of a ditch and tunnel thereon.

XII.

That thereafter and prior to the 6th day of December, 1887, the said Heckenlively did purchase of said Noland all the interest of the said Noland in and to said land under and by virtue of said

contract as set forth in paragraph X of these findings, and the same was assigned to him, but such assignment was not consented to by the railroad company nor did any of the assignments of said contract or any interest therein receive the consent of the Southern Pacific R. R. Co.

17

XIII.

That thereafter, on December 14th, 1887, the said Heckenlively did by deed in form of grant, bargain and sale and for the expressed consideration of one thousand dollars, sell and convey to one S. P. Cushman a portion of the land described in the contract mentioned in paragraph numbered X of these findings and being the land described in paragraph numbered VII of these findings, to wit, the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N., R. 9 W., S. B. M.

XIV.

Thereafter on August 29th, 1888, the said S. P. Cushman did, by deed of grant, bargain and sale and for the expressed consideration of $550, sell and convey to the plaintiff The San Jose Land & Water Company said last described tract of land, to wit: the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N., R. 9 W., S. B. M.

XV.

Said described tract of land is situate in San Dimas canyon in Los Angeles county, and the waters of San Dimas creek or stream flow upon and through a portion of said land. That in and prior to the months of November and December, 1883, one N. W. Stowell owned, or claimed to own, a certain water right in the waters flowing in said creek or stream, the character and extent of which water right the court does not now find or adjudicate; and in said months of November and December, 1883, the said Stowell did enter upon said land and did lay and construct across a portion of said land a 12-inch-pipe line for the purpose of conducting the water so
18 claimed by him from its point of diversion (which point of diversion was not upon said described land) across said land to the S. E. ¼ of said sect. 25, tp. 1 N., R. 9 W., S. B. M., and to other lands.

XVI.

That prior to the month of July, 1887, the defendant, The San Jose Ranch Company had, by mesne conveyances, succeeded to and and now owns the said water right owned or claimed by the said Stowell and all the right and interest of the said Stowell in and to said 12-inch-pipe line.

XVII.

That in the months of July and August, 1887, the defendant The San Jose Ranch Company, by its agents and servants, did enter upon said described land, to wit, the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N., R. 9 W., S. B. M., and did build and construct thereon at a point where the waters of said San Dimas creek flow thereon a stone, brick

and cement forebay, sand box or dam, and did lay and construct from said forebay or dam across a portion of said land a 14-inch-pipe line.

XVIII.

The defendant The San Jose Ranch Company claims the right to maintain on said land, to wit, upon the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N. R. 9 W., S. B. M., the said forebay or dam and the said 14-inch-pipe line mentioned in paragraph XVII of these findings, and also the 12-inch-pipe line mentioned in paragraphs numbered XV and XVI of these findings, but makes no other claim of
19 right, title or interest in or to said described land or any part thereof.

As conclusions of law from the foregoing facts the court finds that the defendant is entitled to judgment that pl't'ff take nothing by its suit and that defendant recover its costs.

W. H. CLARK, *Judge.*

It is hereby stipulated by and between the parties to the above-entitled action, that the foregoing is a full, true and correct copy of the findings of fact and conclusions of law heretofore filed in the above-entitled cause.

It is further stipulated that the original findings of fact and conclusions of law herein have been lost, and that the foregoing may be substituted as a correct copy thereof in lieu of the original.

Dated June 21, 1899.

ANDERSON & ANDERSON,
DUNNIGAN & DUNNIGAN,
*Attorneys for Plaintiff.*
J. S. CHAPMAN,
*Attorney for Defendant.*

It is hereby ordered that the foregoing copy of the findings of fact and conclusions of law be substituted and filed in the above-entitled cause as a correct copy of the original heretofore filed herein, it appearing to the court that the said original findings of fact and conclusions of law have been lost.

Done in open court this 29th day of June, 1899.

JOHN L. CAMPBELL,
*Judge of the Superior Court, Presiding.*

20 Endorsed: Filed Jun-29, 1899, C. W. Bell, clerk, by J. O. Lowe, deputy.

(Title of Court and Cause.)

*Decree.*

No. 10166. Dept. 2.

This cause having been submitted to the court upon the pleadngs and evidence in the case and the argument of counsel for the

respective parties and the court having filed findings of fact and conclusions of law and ordered judgment accordingly:

Now, therefore, it is ordered, adjudged and decreed that the said plaintiff is not the owner of said east half of the northwest quarter of section twenty-five, township one north, range nine west, San Bernardino meridian.

And it is further adjudged that the plaintiff take nothing by its suit against the defendant, and that the defendant recover its costs, herein taxed at the sum of $—.

W. H. CLARK, *Judge.*

Endorsed: Filed Mar. 12, 1897. T. E. Newlin, clerk, by C. G. Keyes, deputy. Docketed Mar. 12, 1897. Entered Mar. 12, 1897. Book 67, page 176. By W. H. Whittemore, deputy clerk.

(Title of Court and Cause.)

*Plaintiff's Engrossed Statement on Motion for a New Trial.*

This cause came on regularly for trial on the first day of
21 September, 1890. The plaintiff appeared by its attorneys Messrs. Anderson & Anderson and R. Dunnigan, Esq., and the defendant appeared by its attorneys Messrs. Chapman & Hendricks and Walter Hughes, Esq., and a trial of said action by a jury was waived and the cause was submitted to the court, who, after hearing the evidence and arguments of counsel, duly considered the cause and on the — day of ——, 1897, did order findings and judgment for defendant. That afterwards, on the — day of April, 1897, and within the time required by law, the plaintiff served its notice of intention to move for a new trial upon the grounds,

First. Of newly discovered evidence;

Second. The insufficiency of evidence to justify the decision of the court; and

Third. That the decision and judgment of the court were contrary to law.

And the plaintiff now here presents its statement of the case pursuant to said notice of intention, containing the evidence offered at the trial of said cause.

2.

Plaintiff offered in evidence in support of the issues in its behalf, an instrument purporting to be a contract between the Southern Pacific Railway Company and Noolan and Heckenlively; also an instrument purporting to be an assignment by Noolan of his interest in the instrument to said Heckenlively; a copy of which instrument and assignment *are* hereunto annexed, marked Exhibit "A" and
made a part hereof; also an assignment and deed from
22 Heckenlively to Cushman, of which said deed the following is a copy:

This indenture, made the 14th day of December in the year of our Lord one thousand eight hundred and eighty-seven, between

Jacob Heckenlively of Los Angeles county, State of California, the party of the first part & S. P. Cushman of said county and State party of second part, witnesseth: that the said party of the first part for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do- by these presents grant, bargain, sell, convey and confirm unto the said party of the second part and to heirs *heirs* and assigns forever, all that certain lot, piece or parcel of land situate, lying and being in the county of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

Being all the right, title and interest in and to the east half of the northwest quarter of section twenty-five (25), township one (1), north range nine (9) west, San Bernardino base and meridian. This conveyance being subject to the terms and conditions of the agreement marked Exhibit A, attached hereto and hereby made a part hereof.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

23 To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever. Subject to the terms of said agreement marked Exhibit (A).

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JACOB HECKENLIVELY. [SEAL.]

Signed, sealed and delivered in the presence of—
J. M. VOSS.

Duly acknowledged by Jacob Heckenlively, Dec. 14th, 1887, before Rob't N. Bulla, N. P.

EXHIBIT "A."

This agreement entered into this 6 day of December, 1887, between J. Heckenlively the party of the first part and S. P. Cushman the party of the second part both of Los Angeles county, California, witnesseth:

That the said party of the first part hereby binds himself and agrees within ten days from this date to bargain, sell and convey all of his right, title and interest in and to the east half of the northwest quarter of section twenty-five (25) township one (1) north range nine (9) west, San Bernardino base and meridian in Los Angeles county, State of California, and also the one inch of water already in sight and developed on said tract of land in consideration of said agreement on the part of the party of the first part, the party of the second part has this day paid the said

first party two hundred dollars, and should said first party's equitable title to said land as purchased from the
24 Southern Pacific Railroad Company prove to be unincumbered by himself or W. D. Noland, the said first party on or before ten days from this date upon the said first party executing and delivering to said second party a good & sufficient instrument conveying and assigning his interest in said land above set forth, agrees to pay said first party eight hundred dollars which is to be in full for said eighty acres & one inch of water now developed, and the said second party for a like consideration agrees & binds himself to employ a competent engineer, one that shall also be acceptable to said first party to go upon said land to further develop the water and said engineer is to continue with the developement of said water as long as in his judgment he is justified in continuing the developement, taking into consideration the prospect of further developement and the cost thereof, and when said water is so developed the said second party agrees to pay said first party five hundred dollars an inch for every inch of water so developed in addition to the inch already developed on above land.

The said first and second parties have hereunto set their hands & seals the day & date above written.

JACOB HECKENLIVELY. [SEAL.]
S. P. CUSHMAN. [SEAL.]

Witness:
J. A. ANDERSON.

Duly acknowledged before Rob't N. Bulla, notary public, Dec. 14, 1887.

It is further agreed by and between the above-named parties,
25 that they each of them pay jointly to the Southern Pacific Railroad Company the sum of sixty-four — $64.10 being the sum due said company as a balance on sec. twenty-five township one (1) north, range nine west, San Bernardino base and meridian, containing 160 acres.

JACOB HECKENLIVELY.
S. P. CUSHMAN.

Duly acknowledged by Jacob Heckenlively & S. P. Cushman, Dec. 14. 1887, before Rob't N. Bulla, notary public.

A full true and correct copy of the original record at request of S. P. Cushman, December 16, 1887, 14 min. past 11 a. m. Frank A. Gibson, county recorder, by J. R. McKee, deputy.

and also a deed from Cushman to plaintiff, of which instrument the following is a copy:

This indenture, made the twenty-ninth day of August, in the year of our Lord one thousand eight hundred and eighty-eight; between S. P. Cushman, of the city and county of Los Angeles, California, the party of the first part, and the San Jose Land and Water Company, a corporation, orgainized under the laws of the State of

California, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five hundred and fifty dollars, gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain and sell, convey and confirm, unto the said party of the
26 second part, and to its successors and assigns forever, all that certain lot and parcel of land situate, lying and being in the county of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

The east half of the northwest quarter of section twenty-five (25) township one (1) north of range nine (9) west, San Bernardino base and meridian.

Together with all and singular the tenements, hereditiments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part and to its successors and assigns forever.

In witness whereof, the said party of the first — has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered in the presence of

S. P. CUSHMAN. [SEAL.]

Duly acknowledged Aug. 30, 1888, before Wm. S. Waters, notary public.

Plaintiff also introduced in evidence a notice from the plaintiff to defendant, of which said instrument the following is a copy:

To the San Jose Ranch Company and R. F. Lotspitch, president of said company:

You are hereby notified that you are now occupying a portion of the east ½ of the northwest quarter of section 25, T. 1 N.
27 of R. 9 west, S. B. & M., in Los Angeles county, State of California, with a water pipe and a brick and stone water catchment. The occupying of said lands by you with said pipes and water catchment is without right or license from the present owner of said lands, The San Jose Land and Water Company, a corporation, and is without right or license from any former owner of said lands. You are requested to remove said pipes and catchment from the above-described land within ten days from the receipt of this notice, and if not removed within that time, this company will be compelled to remove the same.

SAN JOSE LAND AND WATER COMPANY,
By its president, T. W. BROOKS.

W. F. EATON, *Secretary.*

J. HECKENLIVELY, was then sworn in behalf of the plaintiff and testified as follows:

A. Some time in 1887 the defendant in this action put a box on the land claimed, and when I saw him putting in the box I forbid them going any further with the work.

Q. On the northwest quarter?

A. Yes sir.

Q. How far from the line?

A. About eighty feet I judge, west of the east line, probably a hundred yards north of the south line of the land.

Q. What did you say to them about it?

A. I put up a notice on a tree and forbid them. They left for the present. When I went back again they were working and said to me that they were told to go ahead with the work and
28 that I had no business there, and I told them that we would have trouble about it.

Q. Did they complete the box there?

A. Yes, sir; they finished up the work.

(Witness then identified the contract between himself and the railroad company.)

The notice I put up was on a live-oak tree right close to the work, forbidding them to go ahead with the work and trespassing upon the land.

The plaintiff then offered in evidence a map which is hereunto annexed and marked Exhibit "B."

T. W. BROOKS testified as follows:

A. "I know where the line runs between the O'Donnel tract and the Heckenlively tract. The forebay of the San Jose Ranch Company or point of diversion is on the west of the north and south line between those tracts about forty-five to fifty-five feet from it. I examined the five-inch-pipe lines laid down by Stowell quite a number of times—probably four to six times rather definitely and at other times indefinitely. That was the pipe at the head near where this forebay is now situated. At that time the pipe, as well as I can recollect and judge from the appearance, is probably an eight-inch pipe. It is of concrete, and that pipe had its connection with a little iron pipe or five-inch pipe that conveyed the water to Mr. Bixby and Mr. Young and Mr. Goodrich's places. I saw the Haynes ditch in 1883 when I passed up the cañon just above the point where the ditch was taken out of the main run. I
29 passed on the west side and recrossed to the east side of the running water just above where I saw marks of the old Haynes ditch where it was taken out of the cañon or out of the stream. I judge it was about two hundred feet above the forebay of the plaintiff, as at present situated. After leaving that forebay the stream bears a little west of south. There is a little curve in the stream near that place where the marks of the old ditch was

taken out of the stream. Along in 1884, or not later than 1885, I passed up the cañon over the newly built road which was built by O'Donnel. On the east side that road was built over the Haynes ditch, destroying the ditch. That old Haynes ditch has not been used since I first saw it."

The following affidavit was admitted in evidence:

(Title of Court and Cause.)

STATE OF CALIFORNIA, } ss:
*County of Los Angeles,* }

Jacob Heckenlively, being duly sworn, deposes and says, that on the 28th day of February, 1887, he bought the N. W. ¼ of sec. 25 T. one N. R. nine W. S. B. M. from the Southern Pacific Railroad Company.

That said railroad company sold the same to him and gave to him a contract for a deed in the usual form given by said corporation upon the sale of its said lands.

By said contract affiant was to pay $160 for said tract of land, as follows, to wit, one-fifth on the delivery of the contract, and also the interest for one year on the balance, and the
30 balance in five years from the date of the contract with 7 per cent. interest thereon, payable yearly in advance.

That on the day of sale affiant paid said railroad Co., the said one-fifth of the purchase price in cash, and the said one years interest on the balance.

That said tract of land was sold to him by the Southern Pacific Railroad Company as a part of its grant to aid in building its branch line granted to it by act of Congress, approved March 3rd, 1871, and said tract is one of the numbered sections prescribed in said grant and is cotenninous with the constructed part of said branch road of said company, and that the same had been at the date of said sale selected and listed by said company, and certified by the register and receiver of this office, and said tract of land was not conveyed to said company, but was excepted from the operation of the grant to said company, because it was within the limits of the grant made to the Atlantic & Pacific Railroad Company by the act of Congress approved July 26th, 1866.

That at the time said tract of land was sold to affiant no part of it was in the *bona fide* occupation of any adverse claimant under the pre-emption or homestead laws of the United States, and no part of same had been settled upon at the date of said purchase, or on the 3rd of March, 1887, and subsequent to the first of December, 1882, by any person claiming to enter same under the settlement laws of the United States, and that affiant was a native-born citizen
31 of the United States, and that he purchased said tract of land from the said railroad company in good faith, believing that the said company had, by virtue of its said grant, the right to sell said tract of land.

(Signed) JACOB HECKENLIVELY.

Subscribed and sworn to before me this — day of November, A. D. 1897.

——— ———,
*Notary Public in and for the County of Los Angeles, State of California.*

We consent that this may be filed in lieu of original.
W. CHAPMAN.

N. W. STOWELL, called as a witness for the defendant, testified as follows:

Am acquainted with the San Dimas canyon. First knew it in 1875; and was about there from 1877 to 1883. Am acquainted with the ditches connecting with the San Dimas creek, for the purpose of diverting water. I know the old ditch. Used to know the land in section 25, the southeast quarter, and used the water of the creek for irrigation in section 25 first, and afterwards in section 36, and section 1, in the township below. Diverted water in an open ditch for years and afterwards there was a pipe put in in addition to it. That ditch connected with the stream a little above the center point of the section, I think about five or six or eight hundred feet above the center of section 25. I sold out in '83. The change was made from the ditch to the pipe, I think, in 1878, that the first pipe was
32 put in, but we also used the old ditch at the same time, the pipe connected with the stream a little below the original dam that connected with the ditch and then the pipe was connected with the ditch. We used to build a dam there every year, but when the pipe was laid the dam that was used was about the same point, which was a hugh boulder, that the old dam that was used with the ditch was, and up to the time I left there we continued to divert it about the same point. It didn't vary more than fifty feet from it. The point of diversion at the last time I was there, I should say, 150 or 200 feet below where it was originally. I did some work there in '84, and I think, in '87. There were branch pipes put in in '83, running along on bed rock of the creek and some of them were used just as the feeders spread out in order to catch the water on the bed rock. The dam in the winter of '82 and '83 was at the same point where it had always been, at the big rock. I don't think there was any dam ever put in to amount to anything, after that one. I don't remember of seeing any. When I was up there, there was part of the water running by and part of it running in what seemed to be * * * there wasn't much dam about it, but just a little sand thrown up, and it was running into the pipe. During the time I knew the stream, there wasn't a very long time that the water didn't flow down to the dam, more or less. The time I first went there the ditch which was there was one used on my own land. The
33 pipe was used by different parties between '78 and '83, perhaps a dozen different parties that used the water through the pipe. I first purchased of John Haynes the water right. There was no pipe laid there till I laid the five-inch pipe, which was in '78 or '9, and those pipes were laid so that they could connect either

with the stream or the Haynes ditch. There was a ten-inch pipe laid, but not in the creek. The ten-inch pipe was on some of the land in section 25 that I bought from Haynes. The canyon pipe was a 12-inch pipe, out upon this quarter section that I bought from Haynes, and from there down it was a ten-inch. The 12-inch pipe was laid in '83.

A deed was here offered in evidence from John W. Haynes to N. W. Stowell, of date September 13th, 1878, recorded in Book 65, of Deeds, at page 45, and was a conveyance of the tract of land referred to by the witness, of the southeast quarter of section 25, and the right thus conveyed to Stowell was subsequently conveyed to the defendant in this action and before the commencement of the action.

The witness continued: I posted several notices of appropriation and some work was done under all those notices, but the water never was got out and delivered under any of them. I claim simply under the Haynes water right. That is the only water right I ever claimed under. Those notices were posted, most of them, before I bought the Haynes right, and Haynes claimed all the right and said that he had used it, so we had no further work to do under these notices,
34 was my opinion. After I bought the Haynes right all the water was used while there was any water there that we could get through the ditch and pipe. Usually there was water until June, nearly every year; there would not be enough, though, to fill the ditch and pipe both. We always got water enough for domestic purposes through the pipe. From '78 to '83 there was always enough to keep what orchards there was in that neighborhood alive.

Cross-examination:

After I bought out Haynes, we laid that five-inch pipe. That was below the big boulder. We put it in the ground there below the big boulder. I think there was about three miles of pipe altogether. It went over into section 6. Before I sold out I always ran water out every spring when there was plenty of water in the ditch. I don't think I had in any more alfalfa than Haynes did. The alfalfa patch was within 1,500 or 1,800 feet of the place of diversion. From the granite rock, the point of diversion of the old ditch, to where the connection was made between the old ditch and the pipe, was about 200 feet, and the old ditch and pipe were connected about where the forebay is now. The length of the connection between the ditch and the forebay I would think is not over 10 feet. The old Haynes ditch, as it ran down, is within 10 feet on the line of the five-inch pipe. I bought the northeast quarter of section 25, I had no title to it except what I got from the railroad company. I sold it to a man of the name of O'Donnel. I also got with the deed
35 from the railroad company the relinquishment from the railroad company to the United States. I gave O'Donnel the deed, reserving all his rights for his ditches. I bought the southeast quarter of Haynes.

The defense read in evidence the deposition of DAVID O'DONNEL, who testified as follows: I formerly owned the northeast quarter of section 25, township 1 north, range 9 west, S. B. M. Settled on the land in 1882, and in July, '83, left it. Am acquainted with the San Dimas creek that flowed through the land. In the winter of '82 and '3 Stowell put in a cement pipe. The point of diversion was near the southwest corner of my place. The pipe was about 12 inches in diameter at the point of diversion and tapered to about six inches. There was an old ditch, partially of pipe, taking water out of the creek below where the new one was placed, when I first moved on the northeast quarter, but was abandoned when the new one was put in.

Defendant also read in evidence the deposition of J. W. HAYNES, who testified as follows: Settled in the San Dimas canyon in 1869, November. Settled on section 25, the southeast quarter. Got the title to that quarter section. Got a patent either in August or September, 1878. Used water from the San Dimas creek to irrigate the land; made a dam and a ditch, and ran it down to the ranch. Can't say exactly how far the ditch was; probably might have been a little over a quarter of a mile, and might have been in the neighborhood of half a mile. I made the ditch; Mr. Martin
36 helped me some, but the ditch was made for my purpose. Turned the water out at the narrows of the canyon. The dam was above the north bound-ry of my tract—about 300 yards from my line, where I made the dam. Built the dam with brush and rock and sand; used it up to the spring of 1878. Commenced using in March, 1870. No one else lived in the canyon at that time, except Mr. Martin, who lived a mile below me. No one else used water from the canyon while I was there, except on the Chappel place. Chappel settled there two or three years afterwards, and talked with me about the water, and I told him I had no objection to his using it, because when he used it on his sandy land it ran right back into the creek, and he didn't have more than two acres, more or less, to use the water from the canyon. I am a native-born citizen of the United States. Maintained my dam in the creek all the time, and cleaned the creek out. Took out the drift. When the water fell I went and cleaned out the creek and kept the dam. Never relinquished my claim to the dam until I sold it.

Cross-examination:

Used the water for alfalfa and nothing else. I sold out to Stowell. I was back there in June, 1879. I had to repair the dam every spring, but I kept it up all the time. I got a patent for the land before I left, and sold it to Stowell and conveyed it to him by a deed.

Evidence was also introduced showing that the title of
37 Stowell had vested in the San Jose Ranch Company.

The plaintiff now assigns as error on said statement that there is no evidence sustaining the finding that the plaintiff did not

own the property described in the complaint, and in the findings of the court. That the evidence clearly established the fact that the plaintiff and its vendor both purchased the property in good faith, believing the title of the railroad company thereto to be valid, and had taken possession and made improvements upon said property and expended money thereon in good faith. That under and by virtue of the laws of the United States they were entitled to purchase said property when the same came to the market, which right to purchase was good against the whole world, and could not be taken away from plaintiff, either by a purchaser in good faith, or by such trespasses as would deprive the plaintiff of his rights by the statutes of limitation; all of which appears from the testimony in the case.

Plaintiff assigns as further error, that the decision and judgment of the court were contrary to the law in this: that it appears from the undisputed evidence in the case that the plaintiff and its vendors were *bona fide* purchasers and in possession of the property, and entitled to purchase the same from the Government of the United States when the same came into the market; yet under this issue, which was material, and which was supported by abundant evidence showing the said facts, the court has failed to make any finding at all, and for this reason the plaintiff claims that it is entitled to a new trial in said cause.

38 (Title of Court and Cause.)

It is hereby stipulated in the above-entitled actions that the E. ½ of the N. W. ¼ of section 25, T. 1 N., R. 9 W., S. B. M. is within ten miles of the Southern Pacific railroad as shown by its location map filed in the office of the Commissioner of the General Land Office pursuant to act of Congress of March 3rd, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

That a corporation entitled the "Southern Pacific Railroad Company" was created and organized under the laws of California by articles of incorporation dated December 9th, 1865, for the purpose of constructing, owning and operating a railroad from some point on the bay of San Francisco in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Los Angeles and San Diego to the eastern line of the State of California.

That said company was not authorized by said articles nor by the laws of California, to construct a railroad from Tehachapi by way of Los Angeles to the Colorado river.

That said company accepted the grant, rights and franchises granted by said act of Congress approved March 3rd, 1871, and duly filed its location of route on the 3rd day of April, 1871.

That on the 12th day of August, 1873, a company was organized under the laws of California, by the consolidation of the
39 Southern Pacific Company and the Southern Pacific Branch Railroad Company, with articles of incorporation dated

August 12, 1873, which provided for the formation of a new corporation to be known as the Southern Pacific Railroad Company to endure for fifty years from the date of said articles, with a capital stock of ninety instead of 70 millions of dollars, as under the old articles of 1865, and providing for the issue of new stock and the surrender of shares held in the old contracting companies, and for the transfer to the new company of all property, franchises, rights, &c. of both companies.

That a transfer and consolidation was actually made and said new company took control of both roads, and between the years 1874 and 1879 built a railroad from Tehachapi pass by way of Los Angeles to Yuma, and the construction thereof has accepted, approved by the President of the United States as having been done in pursuance of act of Congress approved March 3rd, 1871.

That said corporation is at present the corporation under which the San Jose Land and Water Company claims.

That said company selected the said tract of land claiming the same to belong to it under act of Congress of March 3rd, 1871.

That said tract of land is within the — limits of the land grant of the Atlantic and Pacific Railroad Company under the act of Congress approved July 27th, 1866, as shown by its designated route of its road-bed filed in the office of the Commissioner of the General Land Office on or about the 12th day of March, 1872, and said land grant was duly accepted by said Atlantic and Pacific Railroad Company.

That said Atlantic and Pacific Railroad Company never complied with the terms of said land grant, and never built its said road beside said land, and that Congress passed an act, approved July 6th, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of the railroad and telegraph line from the State of Missouri and Arkansas to the Pacific coast, and to restore to settlement and for other purposes."

That said quarter section of land is non-mineral and is unpatented.

(Signed) ANDERSON, FITZGERALD & ANDERSON &
R. DUNNIGAN,
*Attorneys for San Jose Land & Water Co.*
CHAPMAN & HENDRICK AND
WALTER J. HUGHES,
*Att'ys for S. J. Ranch Co.*

On the 15th day of April, 1871, the Southern Pacific R. R. Co. filed its amended articles of incorporation in the office of the secretary of the State of California. Under these amended articles of association the Southern Pacific R. R. Co. recites the act of the State of California, entitled, An act relating to certificates of incorporation, passed March 1st, 1890, and also an act of the legislature of the State of California, "An act to aid in giving effect to an act of Congress

relating to the Southern Pacific R. R. Co.," passed April 4th,
41 1870, and also reciting the act of Congress of July 27th, 1866 (the Atlantic & Pacific act), and also reciting the act of Congress of March 3rd, 1871, (the Texas Pacific act) and further reciting: "That whereas, the said Southern Pacific R. R. Co. desires to secure to itself the grants, rights and privileges conferred upon it by said act of Congress of the U. S. and to that end to alter and amend its articles of association as provided in the foregoing acts of the legislature of the State of California, so as to include in its line of railroad and telegraph, the line or route designated in the aforesaid act of Congress of March 3rd, 1871, to wit: the line from a point at or near Tehachapi pass, by way of Los Angeles to Texas Pacific R. R. at or near the Colorado river," also reciting the unanimous vote of the board of directors that the articles of the association of said company should be amended, further reciting that at a stockholders' meeting at which more than two-thirds of the capital stock was present, there was an unanimous vote in favor of amending the articles of association.

Article 3 of the amended articles of association state- to the effect that the objects of the same are to purchase, construct, own and maintain and operate a continuous line of railroad from the city of San Francisco in the State of California through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino and San Diego, to some point on the Colorado river, in the southeasterly part of the State
42 of California, a distance of 320 miles as near as may be, also a line of road from a point at or near Tehachapi pass by way of Los Angeles to the Texas and Pacific railroad at or near the Colorado river a distance of 324 miles, as near as may be, also a minor line of road in the county of Santa Clara; also such branches of said lines as the board of directors may consider advantageous.

The capital stock of the corporation is put at $70,000.

It is admitted that all the provisions of the law were fully complied with in order to give effect to the new articles of association and the said amendment.

Again, on the 12th day of August, 1873, further articles of association, amalgamation and association, were made and executed by and between the Southern Pacific Railroad Co. and Southern Pacific Branch R. R. Co.

(See Master's Ex. 125.)

At this point in the statement there appears the same matter herein contained in this statement on motion for a new trial, commencing on line — page — of this transcript, and ending at line — page — of this transcript.

G–291. (1–9, '87. 500.)

Southern Pacific Railroad Company, land department.

No. 6365. Ex. A.

This agreement, made in San Francisco, California, this twenty-eighth (28) day of February, A. D. 1887, between the Southern
43 Pacific Railroad Company, party of the first part, and W. D. Nolan and J. Heckenlively, of the county of Los Angeles, State of California, parties of the second part,

Witnesseth that the party of the first part in consideration of the covenants and agreements of the parties of the second part, hereinafter contained, agrees to sell to the parties of the second part the following tract of land, situated in the county of Los Angeles, State of California, and known and designated on the public surveys of the United States as the northwest quarter (N. W. ¼) of section twenty-five (25) township one (1) north, range nine (9) west, San Bernardino base and meridian, containing one hundred and sixty (160) acres, for the sum of one hundred and sixty (160) dollars, gold coin of the United States.

And the parties of the second part, in consideration of the premises, agree to buy the land hereinafter described and to pay to the party of the first part the said sum of one hundred and sixty ($160) $\frac{00}{100}$ dollars; as follows, to wit: thirty-two ($32) $\frac{00}{100}$ dollars; and also $8.96, one year's interest in advance on the remainder, in United States gold coin of the present standard of value, on the execution of this contract (which two last-mentioned sums have this day been fully paid), and the remainder to wit: the sum of one hundred and twenty-eight ($128.00) dollars with interest thereon, annually in advance at the rate of seven per cent. per annum, both in United States gold coin of the present standard of value, at its office
44 in the city and county of San Francisco, on or before the 28th day of February, 1892; and also to pay all taxes and assessments that may at any time be levied or imposed upon said premises, or any part thereof; and if the parties of the second part shall fail to pay such taxes or assessments or any part thereof at any time when the same shall become due, then the said party of the first — may pay the same; and all sums so paid by the party of the first part shall be added to and become a part of the unpaid remainder, and shall bear interest at the same rate, and be paid in the same manner and at the same time and place hereinbefore provided for the payment of said remainder and the interest thereon.

It is further agreed, that upon the punctual payment of said purchase-money, interest, taxes and assessments, and the strict and faithful performance by the parties of the second part, their legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent thereof from the United States, upon demand and the surrender of this instrument, execute to the party of the second part, their heirs and assigns a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land.

It is further agreed that until the full payment of said purchase-money, interest, taxes and assessments, no strip or waste shall be made on said premises, and that no wood or growing trees shall be cut thereon, except for necessary fuel for the family of the
45 legal occupant under this contract, and for the erection of buildings or fences on said land without the previous written consent of the parties of the first part.

It is further agreed that the parties of the second part may at once enter upon, take and hold possession of said premises provided, however, that if the parties of the second part shall fail to make any of said payments of remainder, or interest, taxes or assessments, as herein provided, or shall fail to comply strictly with any of the stipulations of this contract, then this right shall cease, and the party of the first part, its successors or assigns may, without notice, enter upon, take and hold possession of the said premises with all the improvements thereon.

It is further agreed, between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as, in consequence of the circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant; therefore nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will upon demand repay (without interest) to the parties of the second
46 part all moneys that may have been paid to it by them on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for said tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented the party of the first part does not guaranty the possession of them to the parties of the second part, and will not be responsible to them for damages or costs in case of their failure to obtain and keep such possession.

It is further agreed, that if the party of the first part shall obtain patent for part of the lands herein described and shall fail to obtain patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the parties of the second part will never deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part; and that they will not obtain or hold possession of all or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, ex-

cept by endorsement, and with the written consent of the
47 party of the first part, and the written promise of the assignee to perform all the undertakings and promises of the parties of the second part as above set forth.

It is further agreed, that the parties of the second part shall pay $300 for expenses of the acknowledgements to the deed that shall be issued on this contract.

In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its secretary and land agent, and the parties of the second part have signed their names hereto.

JEROME NADDEN, *Land Agent.*

J. S. WILLCUTT, *Secretary.*

his
W. D. x NOLAN. [SEAL.]
mark.
JACOB HECKENLIVELY. [SEAL.]

Signed, sealed and delivered in the presence of—
C. CABOT.

*Schedule of Prices at which the Lands Described in this Contract have been Sold this Twenty-eighth (28) Day of February, 1887.*

| Fraction. | Sec. | Tp. | Range. | B. & M. | No. of acres. | Rate per acre. | Amount. |
|---|---|---|---|---|---|---|---|
| N. W. ¼ | 25 | 1 N. | 9 W. | S. B. | 160 | 1.00 | $160.00 |

JEROME MADDEN,
*Land Agent.*

I, W. D. Nolan, one of the parties of the second part in the within contract No. 6365, for and in consideration of two hundred and fifty dollars to me in hand paid, do hereby sell, assign and transfer
48 all my right, title, interest and claim, in and to the within-described tract or parcel of land and the within contract No. 6365, unto J. Heckenlively, his heirs and assign- forever, subject to the stipulations and conditions therein contained, which are to be performed by said assignee.

Given under my hand and seal this 20th day of July, A. D. 1897.

his
W. D. x NOLAN. [SEAL.]
mark.

Witness: J. A. Clarke, who wrote the name of W. D. Nolan at his request and saw him make his mark.

Duly acknowledged by W. D. Nolan before J. A. Clarke, notary public, July 20, 1887.

I, Jacob Heckenlively, one of the parties of the second part in the within contract No. 6365, for and in consideration of one thousand dollars to me in hand paid, do hereby sell, assign and transfer the east half of the within-described tract or parcel of land, subject to the conditions of the within contract.

Given under my hand and seal this 14th day of December, A. D. 1887.

JACOB HECKENLIVELY.

Signed in pres. of
J. M. VOSS.

Endorsed.

Interest $8.96 due on the 28th day of Feb'y of each year.
Remainder of principal $128.00 due on the 28th day of February, 1892.

49 Settled and allowed this 14th day of Feb., 1898.

W. H. CLARK, *Judge.*

Endorsed: Filed Feb. 14, 1898. T. E. Newlin, clerk, by C. W. Blake, deputy.

(Title of Cause.)

*Order Denying Motion for New Trial.*

TUESDAY, *October* 10, 1899.

Superior Court, Dept. 2.

Plaintiff's motion for a new trial on the grounds stated in his notice of motion filed herein, argued and submitted October 9, 1899, is this day by the court denied.

(Title of Court and Cause.)

*Notice of Appeal.*

Take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California, from the judgment therein given, made and entered in the said superior court, on the 12 day of March, 1897, in favor of the defendant in said action, and against said plaintiff and from the whole of said judgment.

Yours, &c.,

ANDERSON, FITZGERALD AND ANDERSON,
R. DUNNIGAN,
*Attorneys for Plaintiff.*

To the clerk of said superior court and Chapman & Hendricks, Esq., attorneys for defendant.

50 Dated this — day of March, A. D., 1898.

Endorsed: Service and receipt of a copy of the within noticee of appeal after filing is hereby admitted this 8 day of March, 1898. J. S. Chapman, attorney for def't. Filed Mar. 8, 1898. T. E. Newlin, clerk, by C. G. Keyes, deputy.

(Title of Court and Cause.)

*Notice of Appeal.*

To the clerk of said superior court and to the defendant in the above-entitled cause and to John S. Chapman, its attorney:

You will please take notice that the plaintiff in the above-entitled cause does hereby appeal to the supreme court of the State of California from the judgment and order of the superior court of the State of California, made and entered on the 10 day of October, 1899, denying the plaintiff's motion for a new trial in the above-entitled cause; and the said plaintiff appeals from the whole of said order made and entered by the superior court, department 2, on the 10 day of October, 1899.

Dated, this 24th day of October, 1899.

ANDERSON & ANDERSON,
R. DUNNIGAN,
*Attorneys for Plaintiff.*

Endorsed: Service of the within admitted this 24th day of October, 1899. J. S. Chapman, attorney for defendants. Filed Oct. 24, 1899. C. W. Bell, clerk, by C. G. Keyes, deputy.

51 (Title of Court and Cause.)

*Stipulation.*

It is hereby stipulated and agreed by and between the attorneys for the appellants and respondents in the above-entitled cause that the foregoing printed pages contain full, true and correct copies of the complaint, amended answer to the complaint, findings of fact, decree, plaintiffs' statement on motion for a new trial, order denying motion for new trial and notice of appeal from judgment, and notice of appeal from order denying motion for a new trial, as the same appear of record in the office of the county clerk of Los Angeles county, State of California, and being filed in the records of the superior court of said county, and that the same shall constitute the transcript on appeals, and that both appeals may be heard on the foregoing transcript.

It is further stipulated that good and sufficient undertakings on appeals, upon each appeal in due form, were properly filed within the time required by law.

ANDERSON & ANDERSON AND
R. DUNNIGAN,
*Attorneys for Plaintiffs and Appellants.*
JOHN S. CHAPMAN,
*Attorney for Defendants and Respondents.*

52 Due service of the within, and receipt of a copy hereof acknowledged this 2nd day of December, 1899.

J. S. CHAPMAN,
*Attorney for Respondents.*

I hereby certify that a copy of the within was deposited with me this 2nd day of December 1899, to be delivered to the judge who presided at the trial of said cause in the superior court of the county of Los Angeles, State of California.

C. W. BELL, *Clerk*,
By D. S. BURSON, JR., *Deputy*.

154 Filed Sept. 13, 1900. Geo. W. Root, Clerk, by A. E. Hornlein, Deputy.

Department Two.

SAN JOSE LAND & WATER COMPANY, Plaintiff and Appellant,
*v.*
SAN JOSE RANCH COMPANY, Defendant and Respondent.
} L. A. No. 858.

Action to quiet title to the E. ½ of N. W. ¼ sec. 25 tp. 1 N. R. 9 W. situated in Los Angeles county and of which plaintiff claims to be the owner. Defendant denied plaintiff's ownership and denied that defendant claims any interest in the land except "the right to maintain in San Dimas creek (which flows over said land) a dam at a point about 100 yards northerly from the center of said section 25, and to maintain pipes connecting with the said creek at the said dam for the purpose of conducting the waters of said creek to lands below the said section 25, for the purpose of irrigation and for domestic use" and denies that its said claim is without right. Defendant also pleaded sec. 318, C. C. P., as a bar to the action. For a third defense defendant alleges that in 1868 one J. W. Hanes settled upon a tract of land at the mouth of San Dimas cañon and near the center of said section 25, claiming the same for cultivation and grazing and on September 23, 1870, he caused to be recorded in county recorder's office
155 in said county a possessory claim under the act approved April 20th, 1852, and acts amendatory thereof, setting forth in his affidavit claiming the land the requisite facts; that he at the same time claimed the waters of said creek for the purposes aforesaid and had prior to said time entered upon said creek at a point about 100 yards north of the north boundary line of the S. E. ¼ of said section and about 20 feet west of the north and south line through the center of said section, and constructed a dam, and a ditch connected with said creek at a point immediately above said dam and extending down to and upon the land so claimed by him for the purpose of diverting the waters of said stream and by means thereof did divert the waters of said stream to and upon the land occupied by him and used the same for irrigation and domestic purposes; that the said ditch and the pipes subsequently laid along the course thereof have been continuously used by defendant and its grantors and predecessors from said time in 1870 to the commencement of this action for said purposes on said lands and for like purposes on other lands in the vicinity of said S. E. ¼ of said

section 25; that at the time of said appropriation and the location of said land said section 25 was unsurveyed public land and defendant has succeeded by mesne conveyances to all the right and interest of said Hanes in said dam and ditches, pipes, rights of way and easements upon said section 25, and it and its grantors and predecessors have ever since 1870 been in the open, uninterrupted and notorious and adverse use of said dam, ditches and pipes, under a claim of right adversely to plaintiff and all the world and defendant disclaims any other right to said E. ½ of the N. W. ¼ of said section.
156 The cause was tried by the court and defendant had judgment; that plaintiff is not the owner of the land claimed by it and that defendant recover its costs. There was evidence tending to establish the first and third defenses set up.

It appears from the findings and evidence that the land was within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company under the act of July 26th, 1866, (14 U. S. Stats. p. 292); that company failed to build its road and its grant was forfeited by act of Congress of July 6th, 1866 (24th U. S. Stats. p. 123), and the land was restored to the public domain. The land in question was also within the ten-mile limits of the grant of land to the Texas and Pacific Railroad Company by act of March 3rd, 1871, (16 U. S. Stats., p. 573); by the terms of that act the Southern Pacific Railroad Company was authorized to construct a line from Tehachapi pass, by the way of Los Angeles, to the Texas and Pacific railroad at or near the Colorado river with the same rights as had been granted to the latter company; the Southern Pacific Railroad Company constructed its line to Yuma between 1874 and 1879 and pursuant to the act of 1871, selected the land in controversy; the land was unpatented and non-mineral; on February 28th, 1887, the latter company entered into a contract of sale and purchase of the N. W. ¼ of said section with W. D. Noland and Jacob Heckenlively; for $160; they paid $32 as first payment of the principal and one year's interest in advance and agreed to pay $128 within five years and interest annually which latter was paid to February, 1892, and no further payments of principal or interest were made: N. & H. were citizens of the United States and purchased the land from the company in good faith; it was not then occupied by
157 any *bona fide* claimant under the pre-emption or homestead laws and had not been settled upon at the date of the purchase, or on March 3rd, 1887, or subsequent to Dec. 1st, 1882, under the settlement laws of the United States; neither N. nor H. nor any of their assigns ever settled on the lands, cultivated or fenced any part thereof, but H. "did under said agreement of purchase shortly after it was executed (which was February 28th, 1887), enter upon said land and commence the construction of a ditch and tunnel thereon." There is no evidence in the record as to where Heckenlively entered upon the land for the purpose stated, how long he remained or the extent of any work done by him in the construction of a ditch or tunnel, or the extent of his possession of the land. Noland on Dec. 6th, 1887, assigned his interest in the contract to Heckenlively; Dec. 14th, 1887, H. conveyed by grant deed to one

Cushman the land in controversy, and on Aug. 29th, 1888, C. conveyed by grant deed to plaintiff the same land. The court finds that in and prior to the months of November and December, 1883, one N. W. Stowell owned, or claimed to own a certain water right in the waters of said creek, "the character and extent of which water right the court does not now find or adjudicate" and that in said months Stowell laid and constructed across a portion of said land a 12-inch-pipe line to conduct water across said land to the S. E. ¼ of said section and to other lands; that prior to July, 1887, the defendant had by mesne conveyances, "succeeded to and now owns the said water right owned or claimed by the said Stowell and all the right and
158 interest of the said Stowell in and to said 12-inch-pipe line;" that defendant in July and August, 1887, did enter upon the land in controversy and "did build and construct thereon at a point where the waters of said San Dimas creek flow thereon, a stone, brick and cement forebay, sand box or dam, and did lay and construct from said forebay or dam across a portion of said land a 14-inch-pipe line;" the court finds that defendant claims the right to maintain said forebay or dam and the said 14-inch-pipe line and also the 12-inch-pipe line laid by Stowell, but makes no other claim of right or title. The court does not find nor does it decree that defendant has such right; its conclusion of law is that plaintiff should take nothing by its action and the decree was that plaintiff is not the owner of the land, and that defendant have judgment for its costs.

As the court has not found upon the issues presented by the affirmative allegations of the answer, but has disposed of the case entirely on the finding that plaintiff has no title to be quieted, we shall direct our attention to that issue.

Appellant contends that if any interest in this land passed to the purchasers under the contract of Noland and Heckenlively with the railroad company then they or their vendees may protect that right by this action. The provisions of section 738 of the Code of Civil Procedure have been held to be broad enough to include an equitable title to real property, Tuffree *v.* Polhemus, 108 Cal. 670; and it may be that the right to purchase land under the act of 1887, presently to be noticed, may under some circumstances be quieted as against an unlawful trespass. The question is, Has plain-
159 tiff established a right under the allegation of ownership such as will entitle it to the relief asked? Plaintiff makes no claim under the Atlantic and Pacific Railroad Company's grant nor is the claim directly from the Texas and Pacific grant of March 3rd, 1871, of which the Southern Pacific Railroad Company availed itself by constructing its road. The court finds that this latter company made selection of this land under the act of 1871, but the court also found that the land within the ten-mile limits, — which latter fact made the selection an unnecessary proceeding if the grant had otherwise been effective. The selection gave no additional right.

When the grant was made to the Atlantic and Pacific Railroad Company the effect was to withdraw the land granted from other

disposition while that grant remained operative, both within the primary and indemnity limits, and the Southern Pacific Railroad Company took nothing by its grant and could convey nothing to Noland and Heckenlively; U. S. *v.* Southern Pacific Railroad Co., 146 U. S. 570; U. S. *v.* Colton M. L. Co., *id.* 615; Sp. Co. *v.* U. S., 168 U. S. 1; S. P. Co. *v.* Painter 113 Cal. 247. Whether defendant's predecessors could acquire any right of way or other easement, or appropriate the waters of San Dimas creek, after the grant to the Atlantic and Pacific Company, if that company had finally perfected its right to a title and had objected to such appropriation, need not be decided. While the land was withdrawn from entry under its grant it did not object to defendant's appropriation and before any rights were acquired by plaintiff's predecessors, the land was restored to the public domain and whatever rights defendant's predecessors had acquired by appropriation of water or rights
160 to make ditches and lay pipe lines, attached at once upon the forfeiture of the grant of the Atlantic and Pacific Company by the act of 1886, and the restoration of the land to the public domain. If the land had not been granted to the A. & P. Company the rights of the appropriators would have attached to the land under the act of July 26th, 1866, and amendatory acts, granting the right to construct ditches etc., and we see no reason why upon the failure of the grant and the resumption of full title by the Government that defendant's rights did not become valid from their inception. It results that whatever rights defendant acquired were undisturbed by the grant of any of these roads and but for the act of Congress, next to be noticed, these rights of defendant are indisputable. On March 3rd, 1887, Congress passed an act entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes;" 24 U. S. Stats. p. 556. The main purpose of this act was to relieve purchasers of forfeited lands. Section two provided for cancelling patents erroneously issued to any company. Section three related to *bona fide* settlers under the pre-emption or homestead laws and reinstated in their rights if their application was renewed within a reasonable time. Section four gave the right to a purchaser in good faith from the railroad company to a patent from the Government, upon making proof of such purchase within such time as might be prescribed by the Secretary of the Interior. The case before us does not come within the provisions of any of these sections.

161 Appellant claims under section five which reads as follows: "That where any company shall have sold to citizens of the United States * * * as parts of its grant, lands not conveyed to or for the use of such company, * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands, at the ordinary price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns." Provisos in the section except there-

from lands "in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws," etc., and also "lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States," etc. 24 U. S. Stats., p. 556.

It will be observed that this right to purchase was subordinated to the rights of claimants under the pre-emption and homestead laws and the settlement laws of the United States, from which it would seem evident that the lands were previously treated as public lands open to settlement. A purchaser from a railroad company prior to the act would gain no advantage by his purchase as against the excepted classes. And we think the right of any such purchaser who based his right solely on his contract of purchase, would be subordinate to rights of way, ditch, and water rights, previously acquired in good faith under the laws of the United States. It may be that if the purchaser from the railroad company was in actual possession of the land when the relief act of 1887 was passed, and had made or was making valuable improvements thereon in good faith, believing that he had title from the company, and he showed that he had applied to purchase, or that he intended within a reasonable time to make application to purchase under said act, the courts would protect his right as against a right acquired by another person subsequent to such possession and declared intention. But, as between a right, such as is claimed by defendant, acquired prior to the act of 1887, and prior indeed to the act of 1871, and as early as in 1870, and the right by which plaintiff claims, the former must prevail.

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In the case before us there is no evidence that plaintiff or its predecessors are now *are* ever were in possession of the land; there is a finding that Heckenlively, shortly after he entered into the contract with the S. P. R. R. Co., "did enter upon said land and commence the construction of a ditch and tunnel thereon," but there is no evidence as to what part of the land this was or as to the extent of this temporary possession, or how long he remained or what work he did; there is no evidence that plaintiff or any of its predecessors ever applied to purchase the land or expressed an intention to do so or that plaintiff now desires to purchase or intends to purchase the land. Its right to purchase accrued, if at all, in 1887. It seems to me conceding that it has not lost this right by its delay to make application to purchase, that a court of equity ought not to grant the relief asked upon a mere right to purchase, such as is shown in this case, where it appears that plaintiff and no person under whom it claims was ever in possession of the land; is not now in possession; has never applied to purchase the land and does not show any intention to purchase it. We think there should be some more tangible right shown than appears here before a court of equity will lend its aid to quiet plaintiff's right which appears to be nothing more than an option to purchase unaccompanied by any equitable circumstances.

163

Respondent claims that the court made no findings on the facts alleged in defence—in other words, that it did not find as to defend-

ant's title. The complaint alleged ownership in plaintiff; the evidence was clearly insufficient to establish ownership; the findings of fact give all the evidence upon which the claim of plaintiff rests and the court as a conclusion of law found "that the defendant is entitled to judgment that plaintiff take nothing by its suit," and the decree adjudged "that plaintiff is not the owner" of the land in controversy. Defendant does not appeal nor complain that its title was not adjudicated. We think the findings cover all the facts on which plaintiff relied to show that it is the owner of the land; and as the facts do not support any claim of ownership, legal or equitable but do support the conclusion reached by the court we see no error in omitting to find as to defendant's title or defences.

The complaint was filed in 1889 and came on for trial in 1890. The findings were lost and the judgment was not filed and entered until March 12th, 1897. Findings were substituted by stipulation June 29th, 1899, and the appeal perfected thereafter in due time No explanation is given for the delay in having judgment entered and the findings supplied at an earlier date but no point is made by either party by reason of these facts.

164 There are numerous other interesting questions discussed in the briefs but we think the foregoing disposes of all that are necessary to the decision.

It is advised that the judgment and order be affirmed.

CHIPMAN, *C.*

We concur:
HAYNES, *C.*
GRAY, *C.*

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, *J.*
TEMPLE, *J.*
HENSHAW, *J.*

165 (Title of Court and Cause.)

*Minutes of Court and Filings.*

1899.
Dec. 2. Filed transcript..... L. A.... 10.00
" 26. " app. opening brief.....
1900.
Jan. 22. " stip. resp. 15 days add. to file brief.....
Feb. 1. " resp. brief.....
" 28. " app. reply brief.....
Ap'l 10. " closing brief of resp.....
" 11. " stip. to submit on briefs on file.....
Jun- 28. Submitted & assigned to dept. two.....
Sep. 13. Judgment and order affirmed (comm.).....

McFarland J. Temple J. Henshaw J.

| | | | | |
|---|---|---|---|---|
| Oct. 1. | Filed pet. — rehearing | | L. A.... | 2.50 |
| " 13. | Rehearing denied. By the court. Oct. 13, 1900.... | | | |
| " 15. | Remit-ittur to county clerk | | | |
| 1901. | | | | |
| Apr. 15. | Filed application for writ of error | | L. A.... | .25 |
| " 15. | " order granting " " " | | L. A.... | .25 |
| " 15. | " undertaking | | L. A.... | .25 |
| " 15. | " writ | | L. A.... | .25 |
| " 15. | " præcipe | | L. A.... | .25 |

166 (Title of Court and Cause.)

*Petition for Allowance of a Writ of Error to the Supreme Court of the United States.*

To the Hon. W. H. Beatty, chief justice of the supreme court of the State of California:

Your petitioner respectfully represents, that on the 13th day of September 1900, a final judgment and decision was made and entered by this court in the above-entitled case, then pending on appeal herein.

That the action involves the construction and validity of a Federal statute, namely the fifth section of the act of Congress, of March 3rd 1887, entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes;"

That your petitioner claimed title to the land in controversy, herein, in this action under said fifth section of said act of Congress, the land being the E. ½ of the N. W. ¼ sec. 25, tp. 1 N., R. 9 W. S. B. M. situated in Los Angeles county State of California.

That the decision in this case, rendered by this court, as hereinbefore recited, was adverse to the said right claimed by your petitioner, and was adverse to the validity, force and effect, of said statute, and contrary to the true intent and meaning of said statute.

Your petitioner further represents that the judgment and
167 decision of this court, was erroneous in sustaining the decision of the trial court in holding;

First, that your petitioner, plaintiff herein, acquired no title to the lands in controversy, by virtue of its purchase in good faith from the railroad company and the operation of said statute of March 3rd, 1887.

Second, that your petitioner, plaintiff herein, did not thereby acquire sufficient title upon which to maintain an action to quiet title, under the laws of this State.

Third, that your petitioner, plaintiff herein, was not entitled to exclusive possession and control of said property.

Fourth, that your petitioner, plaintiff herein, was guilty of laches, in not applying to the Government to purchase said lands under the provisions of said act of Congress, and thereby lost any right, priveledge, immunity, or claim, to or in relation to said lands.

Fifth, that the defendant did, or could, acquire any right, claim,

title or eas-ment, in or upon said lands adverse to that of your petitioner, before your petitioner, had been afforded an opportunity to purchase said lands, as provided for in and by said act of Congress of March 3rd, 1887.

All of which was contrary to the true intent and meaning of said act of Congress of March 3rd, 1887:

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to this
168 court, and for such other and further process as will enable your petitioner to obtain a review of the case and a correction of said errors, by said Supreme Court of the United States and your petitioner will ever pray etc.

ANDERSON & ANDERSON,
DUNNIGAN & DUNNIGAN,
*Attorneys for Petitioner and Appellant.*

Endorsed: Allowed W. H. Beatty chief justice of California. Filed Apr. 15, 1901 Geo. W. Root, clerk, by H. G. Simpson, deputy.

169 (Title of Court and Cause.)

*Order Granting Writ of Error to the Supreme Court of the United States.*

Upon reading the petition, and assignments of errors, of The San Jose Land and Water Company, appellants, praying for the allowance of a writ of error from the Supreme Court of the United States, to this court, to review the judgment of this court heretofore rendered, to wit, on the 13th day of September 1900, and it appearing from said petition, and the record of the case that a proper case for the allowance of said writ is presented, it is ordered that the same be, and it is hereby allowed.

Dated this April 12th 1901.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

Endorsed: Filed Apr. 15, 1901. Geo. W. Root, clerk. By H. G. Simpson, deputy.

170 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the San Jose Ranch Company, Greeting:

You are hereby admonished to be and appear at the Supreme Court of the United States at the city of Washington D. C. within thirty days from the date of this writ pursuant to a writ of error filed in the clerk's office of the said Supreme Court of the United States wherein The San Jose Land and Water Company is plaintiff in error and you are defendant in error, to show cause if any there be, why the said judgment in said writ of error mentioned should

not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States of America this 12th day of April 1901, and of the Independence of the United States the one hundred and twenty-fifth.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

Attest: —— ——.

Endorsed: Filed Apr. 15 1901 Geo. W. Root clerk by H. G. Simpson deputy.

Due service of the within is hereby acknowledged this 15th day of April 1901,

J. S. CHAPMAN,
*Attorney for The San Jose Ranch Company (a Corporation), Defendant in Error.*

171 STATE OF CALIFORNIA, } ss:
*County of Los Angeles,* }

I, Geo. W. Root, clerk of the supreme court of the State of California, hereby certify that the foregoing printed and typewritten pages contain a full true and correct copy of the transcript on appeal, petition for rehearing, minutes and filings of the court, opinion of the court, appellant's opening brief, respondent's brief, appellant's reply brief, respondent's closing brief, petition for allowance of writ of error, order granting writ of error, and præcipe, as the same now appear of record in my office, in the case of The San Jose Land & Water Company (a corporation) plaintiff and appellant *versus* The San Jose Ranch Company (a corporation) defendant and respondent, being L. A. No. 858 of the files of the said supreme court of the State of California, and that the same do constitute the return of the said supreme court of the State of California to the annexed writ of error issued out of the Supreme Court of the United States wherein the said San Jose Land & Water Company is plaintiff in error and the said San Jose Ranch Company is defendant in error.

I further certify that the said plaintiff in error has duly filed in my office an undertaking upon said writ of error in due form and approved by the chief justice of the said supreme court of the State of California.

In witness whereof, I have hereunto set my hand and affixed the seal of the court this 1st day of June A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT,
*Clerk of the Supreme Court of the State of California.*
By H. G. SIMPSON, *Deputy.*

172 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The San Jose Land & Water Company, a corporation, plaintiff and plaintiff in error, and The San Jose Ranch Company, a corporation, defendant and defendant in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such statute, a manifest error has happened, to the great damage of the said San Jose Land & Water Company, plaintiff in error as by its said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have them at Washington on the eleventh day of June next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

173 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 13th day of April, A. D. 1901.

[Seal U. S. Circuit Court, Southern Dist. Cal., 1886.]

WM. M. VAN DYKE,
*Clerk of the Circuit Court of the United States for the Southern District of California,*
By —— ——, *Deputy.*

Allowed:
W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

[Endorsed:] L. A. No. 858 Original Writ of error.

174 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO., Plaintiff in Error,
*vs.*
SAN JOSE RANCH CO., Defendant in Error.

*Stipulation.*

Whereas it appears that the judgment of the supreme court of the State of California in this case was inadvertantly omitted from the transcript of the record herein, it is hereby agreed that the following certified copy of said judgment accompanying this stipulation may be filed in this court in order to supply said omission, and that the same may be printed as a part of the transcript herein,

Los Angeles, California, August 21, 1901.

J. A. ANDERSON,
*Attorney for Plaintiff in Error.*

Without waiving objections either to jurisdiction, sufficiency of assignment of errors, or proceedings on writ of error.

J. S. CHAPMAN,
*Attorney for Defendant in Error.*

175 SAN JOSE LAND AND WATER CO. *vs.* SAN JOSE RANCH CO. } L. A. No. 858. On Appeal from the Superior Court of the County of Los Angeles.

The judgment and order are affirmed.

McFARLAND, *J.*
TEMPLE, *J.*
HENSHAW, *J.*

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding is a true and correct copy of an judgment filed September 13th, 1900, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 31st day of July, A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By H. G. SIMPSON, *Deputy*.

176 [Endorsed:] L. A. No. 858. In the supreme court, State of California. San Jose Land and Water Co. *vs.* San Jose Ranch Co. Certified copy of judgment.

177 [Endorsed:] Supreme Court of the United States. San Jose Land and Water Co., plaintiff in error, *vs.* San Jose Ranch Co., defendant in error. Certified copy of judgment and stipulation. J. A. Anderson, attorney for plaintiff in error.

178 [Endorsed:] File No. 18,195. Supreme Court U. S. October term, 1901. Term No. 342. The San Jose Land & Water Co., pl'ff in error, *vs.* The San Jose Ranch Company. Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed Aug. 27, 1901. James H. McKenney, clerk.

179 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO., Plaintiff in Error,
*vs.*
SAN JOSE RANCH CO., Defendant in Error.

*Stipulation.*

It is hereby stipulated that a copy of the following assignments in error in the above-entitled cause has been served upon and received by John S. Chapman attorney for the defendant in error in said cause—and that the same may be filed in this court as the assignment in error in the above-entitled cause, which the plaintiff in error intended to rely on at the hearing, and that the same may be printed as a part of the transcript herein.

Los Angeles, California, August 21st, 1901.

J. A. ANDERSON,
*Attorney for Plaintiff in Error.*
J. S. CHAPMAN,
*Attorney for Defendant in Error.*

180 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO., Plaintiff in Error,
*vs.*
SAN JOSE RANCH CO., Defendant in Error.

*Assignment of Error.*

And now comes the plaintiff in error by J. A. Anderson its attorney and says that in the record aforesaid there is manifest error and it hereby states that the errors therein which it intends to rely on at the hearing are as follows, to wit:—

I.

The supreme court of California erred in holding that the plaintiff in error as a *bona fide* purchaser under the Southern Pacific Railroad Company, acquired no title to, nor estate in the land in controversy under and by virtue of the 5th section of the act of Congress approved March 3rd, 1887, entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands and for other purposes."

II.

The supreme court of California erred in holding that actual continued possession of the land in controversy *were* essential to the main-

tenance of the right and estate to and in said land confer-ed upon plaintiff in error by the said 5th section of said act of March 3rd, 1887, as a *bona fide* purchaser from the Southern Pacific Railroad Company.

III.

That the supreme court of California erred in holding that
181 plaintiff in error was guilty of laches in not having made application to purchase said land under said 5th section of the said act of March 3rd, 1887, prior to bringing this action.

IV.

The supreme court of California erred, in holding that the act of July 6, 1886, (24 U. S. Statutes page 123) opened the land in suit, "to sale, location, or pre-emption or homestead entry," notwithstanding its withdrawal from "sale, location or pre-emption or homestead entry" in favor of the Southern Pacific Railroad Company on April 2nd, 1871, and continued till the 29th of June, 1898.

V.

The supreme court of California erred in holding that defendant in error, had the right under act of Congress to enter upon the land in controversy and build and construct thereon, "a stone, brick and cement for-bay, sand box or dam," and lay a 14-inch-pipe line across same, notwithstanding the withdrawal thereof, from the public domain in favor of the Southern Pacific Railroad Company and after the *bona fide* purchase thereof from the Southern Pacific Railroad Company, by the predecessor of plaintiff in error.

VI.

The supreme court of California erred in affirming the judgment of the superior court of Los Angeles county, notwithstanding the said superior court in its findings found.

1st. That the land in controversy was within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company under grant by act of Congress of July 27th, 1866, and also within the ten-mile limit of the grant to the Southern Pacific Railroad Company by act of Congress of March, 3rd, 1871.

2nd. That the predecessors in interest of plaintiff in error made a *bona fide* purchase of said tract of land from the Southern Pacific Railroad Company on the 28th of February, 1887, sold to them by said railroad as a part of its said grant, and that defendant
182 in error adversely to the predecessor of plaintiff in error and to plaintiff in error and when forbidden by them so to do entered upon said tract of land in July and August, 1887 and built and constructed thereon, "a stone, brick and cement forebay, sand box or dam and did lay and construct from said forebay or dam across a portion of said land a 14-inch-pipe line."

3rd. That the defendant in error claims the right to maintain on

aid tract of land, the said forebay or dam and the said 14-inch-pipe ine.

Wherefore, as well for the foregoing as for other errors apparent pon the face of the record, the plaintiff in error prays that the idgment of the supreme court of the State of California, aforesaid nay be reversed, annulled and held for naught, and that it be estored to all things which it has lost by occasion of said judgnent, etc.

J. A. ANDERSON,
*Attorney for Plaintiff in Error.*

83 [Endorsed:] Supreme Court of the United States. San Jose Land and Water Co., plaintiff in error, *vs.* San Jose Ranch Co., defendant in error. Assignment of error and stipulation. J. A. Anderson, attorney for plaintiff in error. John S. Chapman, attorney for defendant in error.

84 [Endorsed:] File No. 18,195 Supreme Court U. S. October term, 1901. Term No. 342 The San Jose Land & Water Co., pl'ff in error, *vs.* The San Jose Ranch Company. Stipulation of counsel as to assignment of errors. Office Supreme Court U. S. Filed Aug. 27 1901 James H. McKenney, clerk.

85 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO.
*vs.*
SAN JOSE RANCH CO., Defendant in Error.

*Stipulation.*

It is hereby stipulated between the plaintiff in error, by its attorney and the defendant in error by its attorney, that the follow- parts of the record on file herein may be printed for the consideration of the court:

I. All of the transcript on appeal from the superior court of the County of Los Angeles, State of California, to the supreme court of the State of California.

II. All that portion of the transcript on file that is in typewriting commencing with opinion of the supreme court of the State of California and closing with the certificate of *the* Geo. F. Root, clerk of the supreme court of the State of California.

III. The assignment of error on the part of the plaintiff in error and the stipulation relating thereto.

IV. The certified judgment of the supreme court of the State of California and the stipulation relating thereto. Omit title of court and cause, in full on all papers excepting the first page and insert in the place and stead thereof "Title of court and cause."

Los Angeles, California, August 21st, 1901.

J. A. ANDERSON,
*Attorney for Plaintiff in Error.*

Without waiving objections either to jurisdiction, sufficiency of assignment of errors or to proceeding on the writ of error.

J. S. CHAPMAN,
*Attorney for Defendant in Error.*

186 [Endorsed:] Supreme Court of the United States. San Jose Land and Water Co., plaintiff in error, *vs.* San Jose Ranch Co., defendant in error. Stipulation as to part of transcript to be printed. J. A. Anderson, attorney for plaintiff in error. John S. Chapman, attorney for defendant in error.

187 [Endorsed:] File No. 18,195 Supreme Court U. S. October term, 1901. Term No. 342 The San Jose Land & Water Co., pl'ff in error, *vs.* The San Jose Ranch Co. Stipulation as to parts of record to be printed. Office Supreme Court U. S. Filed Aug. 27 1901 James H. McKenney, clerk.

Endorsed on cover: File No. 18195. California supreme court. Term No. 342. The San Jose Land and Water Company, plaintiff in error, *vs.* The San Jose Ranch Company. Filed June 8th, 1901.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

**The San Jose Land and Water Company,**

*Plaintiff in Error,*

*vs.*

**The San Jose Ranch Company.**

## APPELLANT'S OPENING BRIEF.

This is an action brought by the plaintiff under Section 738 of the Code of Civil Procedure of the state of California to quiet title or determine the adverse claims of defendant to the east half of the north west quarter of section 25, township 1, north, range 9 west, S. B. M., a tract of land which was sold by the Southern Pacific Railroad Company by contract dated February 28, 1887, to plaintiff's predecessors, Noland and Heckenlively, as part of such Railroad Company's lands under a grant to it by the Act of Congress of March 3, 1871. The tract of land is situate within the conflicting limits of the Atlantic and Pacific Rail-

road grant and said grant to the Southern Pacific Railroad Company.

The answer denies the title of plaintiff, and sets up by special defense the right to maintain certain dams and ditches and pipe lines over and across said property, alleging that such rights were acquired in 1870 and continued down to the commencement of the action, by which the waters of the San Dimas Creek were diverted by defendants across said lands.

In support of this allegation of ownership, appellant relied upon its rights to purchase said tract of land from the government as a *bona fide* purchaser under a *bona fide* contract from the Railroad Company derived from the 5th Section of the Act of Congress, approved March 3, 1887, relating to the adjustment of railroad grants. The facts showing that appellant's predecessors were *bona fide* purchasers in good faith from the Southern Pacific Railrord Company are fully found by the lower court. [See Findings X and XI, folio 23 17.]

The date of the purchase by defendant's predecessors from the Southern Pacific Railroad Company was February 28, 1887; and the court found that shortly after such purchase the said Heckenlively did, under said agreement of purchase, enter upon said land and commence the construction of a ditch and tunnel thereon. [See Finding XI.]

The court also found that in July and August, 1887, the defendant entered upon said described tract of land and built and constructed thereon a stone, brick, and cement forebay or dam, and laid and constructed across said land from said forebay a 14-inch pipe; and that the defendants now claim the right to maintain on said lands said 14-inch pipe and said forebay or dam.

It will be noted that the construction of this dam or forebay and pipe and the entry on said land for

such purposes was after the passage of the Act of Congress of March 3, 1887, under which appellant bases its right.

The court also found that in 1883, one, Stowell, a predecessor of the defendant, constructed across a portion of said lands a 12 inch pipe line for the purpose of conducting water claimed by him in the San Dimas Creek from its point of diversion, which point of diversion (which point of diversion was not upon said described land) across said land to the S. E. ¼ of said Section 25, Township 1, north, range 9 west, S. B. M., and to other lands.

And it further finds that in the month of July, 1887, the defendant had succeeded to and owned the water right owned or claimed by Stowell and all the interest of said Stowell in the said 12-inch pipe.

The evidence shows that when the defendant entered upon said land in July or August, 1887, and commenced the construction of the forebay or dam thereon, the said Heckenlively, plaintiff's predecessor, saw the work being done and forbade the defendant from going on with the work; that the defendant's workmen thereupon left, and Heckenlively put a notice on a tree nearby forbidding them to go ahead with the work or to trespass upon the land; that when Heckenlively went back he found them at work again, and the workmen told him they were told to go ahead, and that Heckenlively said to the workmen that "we would have trouble about it."

From the foregoing statement of facts found or proven, the chief question presented is this: Has the *bona fide* purchaser of forfeited railroad grant lands such title or interest in the lands under the Act of March 3, 1887, that he can before applying to purchase the land, maintain an action to protect his rights to the land as against a trespasser upon the land? For such we will show was the attitude of the

defendant when it constructed the dam or forebay in August, 1887.

This action while it has been termed an action to quiet title is really an action under Section 738 C. C. P., which is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The section embraces both equitable causes and legal actions, the suit being deemed in the nature of a law action, so that either party is entitled to a jury trial if the defendant is in possession [see 88 Cal. 127; 98 Cal. 420]; and being deemed a cause in equity if the plaintiff is in possession, the form of the complaint being the same in either case. Under said section, the holder of any kind of interest in real property, whether equitable or legal, can maintain an action to determine the claims of others adverse to him, and this whether in or out of possession, the only limitation being that the holder of an equitable title may not maintain the action against the holder of the legal title.

In Pennie v. Hildreth, 81 Cal. 130, the Supreme Court of this State said: "The language of the Code, Section 738, C. C. P., is broad enough to cover every interest or estate in lands of which the law takes cognizance."

See also, Pierce v. Felter, 53 Cal. page 18, where the same strong language is used.

See also, Tuffree v. Polhemus, 108 Cal. 667.

That the Act of March 3, 1887, confers some right or interest in the land upon the bona fide purchaser thereof in good faith for value from the Railroad Company, we think can admit of no doubt. The interest accrued is undoubtedly an equitable interest, which, upon the performance of certain conditions, will ripen

into the legal title. That it is treated as an interest in the land by the decisions of the land office and an interest which may be enforced and protected, is abundantly shown by the authorities. There have been a large number of cases before the land department involving the rights of bona fide purchasers or successors in interest of bona fide purchasers under the 5th Section of the Act of 1887, and we make the following quotation from the syllabi of some of said cases:

"The right of a qualified transferee to purchase under Section 5 is not affected by the fact that his purchase was made after passage of said act, if the land was originally purchased in good faith. L. D. XXVII, 307, VV. 227, XXI. 557.

"Corporations may purchase. L. D. XIX. 141, XXII. 587.

"Any bona fide purchaser, or one to whom the bona fide purchaser has transferred the land, may perfect title under Section 5 when the claim of the corporation fails. XIV. L. D., XIV. 237.

"In 23 L. D. 508. The applicant was Executrix of purchaser from R. R. Co.

"The applicant to purchase makes a prima facie showing that the land was sold by the company to her immediate grantor, that the sale was made in good faith, and that at date of sale the land was not in the occupancy of an adverse claimant under any of the land laws. L. D. XIII. p. 183.

"1. A settlement claim acquired after passage of the Act of March, 1887, and subsequent to the sale of the land by the railroad company, will not defeat the right of the purchaser, or his transferee, to perfect title under the provisions of Section 5 of said act.

"2. A purchaser of the standing pine timber on land excepted from a railroad grant, is entitled to protect the interest thus acquired in the land under

the provision of said section, if the timber constitutes the chief value of the freehold.

"3. A transferee claiming the right to perfect title under the terms of said section, must show that the purchase from the corporation was made in good faith.

"4. The right of a *bona fide* purchaser to perfect title under said section is not affected by the fact that his was made after the passage of said act, if the original purchase was made in good faith.

"Holton v. Rutledge, XX L. D. 227.

"The right of one who purchased land from a Railroad Company prior to the passage of the act of March 3, 1887, to perfect title under the 5th section of said act, is superior to the settlement right of another acquired after the passage of said act.

"Skinbek v. Longster, L. D. XXII. 32.

"Same case shows that all the claimant of benefit of said section has to show is the purchase in good faith for a valuable consideration, and that he is a citizen.

"See also the same effect Yocum v. Keystone Lumber Co., XXII. L. D., 558. The purchase in this case was by a lumber company, the applicant was a transferee.

"Settlement on land withdrawn for the benefit of a railroad company, in violation of an order expressly prohibiting such settlement until the formal offering of said land thereto, confers no right that can be asserted as against the right to purchase under the provisions of section 5.

"A *bona fide* purchaser from a railroad or one taking under such purchaser who has sold and transferred the land, may perfect title under Sec. 5 of said act, when the claim of the company fails. Union Pacific R. R. Co. v. McKinley, et al., L. D. XIV. 237.

"The *bona fide* purchase from the R. R. Company, and the 5th section of the act of 1887, and the con-

tinued withdrawal for purchaser's benefit places the land purchased by said bona fide purchaser in precisely the same position as the land of the homstead settler who has made entry in the land department and done nothing more. Such being the case, McGuire v. Brown, 106 Cal. page 660, is directly in point. In that case it is decided:

"'The Act of Congress confirming vested and accrued rights to the use of water for beneficial purposes, acquired by priority of possession thereof on the public lands, as against homestead settlers on those lands, does not justify a ditch-owner in shifting the point of diversion and the line of his ditch without the consent of a homestead settler on riparian lands, who has obtained a certificate of entry of such lands.

"'The terms of the proviso found in section 9 of the Act of Congress of July, 1866, that whenever any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party permitting such injury or damage shall be liable to the party injured therefor, does not authorize the construction of a new ditch or canal nor grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed.

"'The right of a homestead settler who has made entry but has not made final proof of residence and cultivation, or obtained a patent, amounts to an equitable interest in the land subject to the future performance of certain conditions, and, until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government.

"'The former decisions of this court, to the extent to which they hold that the interests of a settler on the public lands under the pre-emption or homestead laws attaches as against the proprietor of water rights on his tract only as of the time of his final proof or of obtaining a patent, must

be controlled by the decision of the Federal Supreme Court to the contrary.' "

On page 665 the court says:

" 'Has the prior appropriator license to enter upon the homestead claim of such a settler for the purpose of materially changing thereon the point of diversion and constructing new water ways through the land? Is such a license among the servitudes to which the land must be submitted?

" 'We think not. 'In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property.' [Witherspoon v. Duncan, 4 Wall. 218.] The term entry as applied to appropriations of lands within the scope of the language just quoted, has been held to mean 'that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim.' [Sturr v. Beck, 133 U. S. 54749, citing Chotards v. Pope, 12 Wheat. 588; Hastings &c. R. R. Co. v. Whitney, 132 U. S. 357.]' "

In our case the "inceptive right" was acquired under said 5th section, by the *bona fide* purchase of a tract of land within the limits of a land granted to a railroad company and withdrawn for its benefit from "location, sale, or disposal."

On page 669, Vol. 106, Cal., the court says:

" 'In Sturr v. Beck, 133 U. S. 547-549, the court quotes with approval this language of Attorney-General MacVeagh in an opinion rendered by him in 1881: 'Upon the entry, the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part, to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land subject to the future perform-

ance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and, until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government.'"

Just so is the right of the bona fide purchaser from the railroad company "an equitable interest in the land subject to the future performance by" the bona fide purchaser "of certain conditions, (in the event of which he becomes invested with full and complete ownership)" and so "until forfeited by a failure to perform the conditions, by the *bona fide* purchaser his equitable interest must prevail not only against individuals but against the government."

The condition that the bona fide purchaser has to perform, is simply, when by the rules and regulations of the land department he is permitted to do so, to apply within a reasonable time and pay the government price and get his patent.

This "equitable" ownership necessarily attached to the whole land and all its incidents and all fixtures that have been incorporated with the land and becomes a part thereof.

Just as in this California case just cited, the homestead settler had a right to fill up and destroy the ditch put upon the land, by the prior appropriator of the water, after his "entry" of the land, because it was his ditch and not the appropriators who had wrongfully put it there.

The effect of a withdrawal of the lands from settlement by virtue of a grant to the Railroad Company is well settled. See the following authorities:

In St. Paul and Pacific Railroad Company v. Northern Pacific R. R. Co., United States Supreme Court, book 35 of the Lawyers' Co-operative Co., on page

84, S. C. 139 U. S. p. 1, Judge Field, in delivering the opinion of the court in speaking of withdrawal of lands for the benefit of railroad companies, says: "After such withdrawal, no interest in the lands granted can be acquired against the rights of the company." And on the same page, he says: "The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road."

The right to acquire any kind of interest in the United States public domain, whether it be a right to settle upon, to appropriate water upon it, or to construct or maintain a ditch upon it, or to divert water upon it, is confined to such portion of such domain as is legally known as "public land."

In Barden v. the Northern Pacific Railroad Company, 145 U. S. p. 535, [S. C. L. C. Co., U. S. Reports, book 36, p. 806], it is decided that "by public lands is meant such land as is open to sale or other disposition under the general laws. Land to which any claims or rights of others attached, does not fall within the designation of public lands."

Field, in deciding the point just quoted, on page 811, book U. S. R. L. C. Co., says that he at one time dissented from the doctrine, but that the Supreme Court had uniformly held otherwise, and that he himself had come to the conclusion that it was right, and that "it is better and safer, both to the government and private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open the field of litigation between the grantee and third persons." The whole decision is instructive upon the point, as it reviews the authorities.

In Mann v. Tacoma Land Co., 153 U. S., p. 274 [S. C. L. C. Co., U. S. R., book 38, p. 719], it is decided that:

"The term 'public lands' in a statute authorizing location of scrip, does not include 'tide lands.' The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In Butte v. Northern Pacific Railroad Co., book 30, L. C. Co., U. S. R., on page 336, Judge Field delivered the opinion, and in speaking of railroad grants, says:

> "Where the general route of the road is fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

In Sager v. Swenson, 64 Minn. 517, S. C., 67 N. W. R., page 544, it is decided that:

> "Lands within the 'place' or indemnity limits of a land grant railway company are not subject to entry and settlement, and no lawful settlement thereon can be acquired during the continuance in force of an executive withdrawal of such lands from entry and settlement, although the road has no vested right in such withdrawal."

We quote these additional authorities:

Wolcott v. Des Moines Imp. Co., 5 Wall. 681;
Williams v. Baker, 17 Wall. 144, 153;
United States v. Des Moines Imp. Co., 142 U. S. 110, 546;
Riley v. Wells, 154 U. S. 578;
Wood v. Beach, U. S. 150;
Northern Pacific R. Co. v. Musser-Sanitary Co., 168 U. S., pp. 608, 611.

It would seem clear from the foregoing authorities that an interest in the land was acquired by Heckenlively and Noland and by them transferred to the plaintiff by virtue of the bona fide purchase of Heckenlively and Noland from the Railroad Company, and under the Act of March 3, 1887, it would seem to follow irresistibly from such fact that the plaintiff would have a right under the California Statutes, Section 738, C. C. P., to have its right or interest in the land quieted as against the adverse claims of the defendant in so far as the defendant was seeking to assert the right to maintain the structure placed upon said land by it in July and August, 1887, after the purchase by Heckenlively and Noland.

The Supreme Court of this State based its opinion in this cause upon two assumed principles—

*First.* That inasmuch as no actual occupancy of the land had been taken by appellant's predecessors, and no application for patent had been filed by appellant, and there was no evidence given of the intent to make such application, the facts did not show such interest in the land in appellant as would support this action. In other words, that a bona fide purchaser under the Act of March 3, 1887, who was not in possession and who has not exercised his right of purchase or expressed his intention to exercise such option, has no ownership in the land such as could be quieted against one who, prior to the Act of 1887, acquired some interest therein;

*Second.* That a court of equity would not lend its aid to quiet plaintiff's title where the right to purchase accrued in 1887, and the plaintiff up to the time of the decision in 1897 had failed to exercise its right to purchase by making application to the land office to purchase the land under the Act of March 3, 1887.

The opinion in both phases is based upon false predi-

cates. In the first place, the opinion discusses the case entirely upon the theory that the respondent acquired the right to maintain a 12-inch pipe line upon the land prior to 1887, and that such right became vested when the lands were restored to public ownership in 1886, and that such rights were superior to the rights of the bona fide purchaser from the Railroad Company under the act of March 3, 1887.

In discussing plaintiff's rights to maintain the action as against the defendant, the court entirely omits any consideration, so far as the reasoning of the opinion indicates, of the fact found by the lower court that defendant in August, 1887, constructed the forebay or dam and the 14-inch pipe connected therewith upon this land of appellants, which said acts constituted a new and distinct trespass and assertion of a new and distinct right different from and in addition to the right originally acquired to maintain a 12-inch pipe across the land, and defendant is now asserting the right to maintain this forebay or dam and 14-inch pipe.

One who has acquired a right to maintain a pipe line over public lands, cannot, after the rights of others have intervened in the land, acquire any new rights on the land different from those already acquired by virtue of his old easement.

See

McGuire v. Brown, 106 Cal. 670;

Sturr v. Beck, 97 U. S. 576, quoted from above.

If it should be contended that the forebay or dam and 14-inch pipe were merely a change in the form and mode of use of the original easement to maintain a 12-inch pipe, then the case is controlled by Lyman Allen v. San Jose Land & Water Company, 92 Cal. 138, where it is held that one who has an easement for a ditch cannot change it to a 12-inch pipe

line, and by parity of reason, a 12-inch pipe across the land cannot be changed to a 14-inch pipe connected with a forebay or dam constructed upon the land.

As stated above, this phase of the case, to-wit, this new and distinct trespass is not discussed by the learned commissioners who decided the cause, and that part of the opinion bearing upon the right of plaintiff to the relief sought as against the claims of defendants treats these claims as rights acquired prior to 1886, which became vested when the lands were restored to public ownership in 1886. The court in this connection says:

> "While the land was withdrawn from entry under its grant, it did not object to defendant's appropriation, and before any rights were acquired by plaintiff's predecessors the land was restored to the public domain, and whatever rights defendant's predecessors had acquired by appropriation of water or rights to make ditches and lay pipe lines attached at once upon the forfeiture of the grant of the Atlantic and Pacific Company by the act of 1886 and the restoration of the land to the public domain. If the land had not been granted to the Atlantic and Pacific Company the rights of the appropriators would have attached to the land under the act of July 26, 1866, and amendatory acts, granting the right to construct ditches, etc., and we see no reason why, upon the failure of the grant and the resumption of full title by the government, that defendant's rights did not become valid from their inception. It results that whatever rights defendant acquired were undisturbed by the grant to any of these roads, and but for the act of Congress, next to be noticed, these rights of defendant are indisputable. On March 3, 1887, Congress passed an act entitled 'An Act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.'

(24 U. S. Stats., p. 556.) The main purpose of this act was to relieve purchasers of forfeited lands. Section 2 provided for canceling patents erroneously issued to any company. Section 3 related to bona fide settlers under the pre-emption or homestead laws and reinstated them in their rights if their application was renewed within a reasonable time. Section 4 gave the right to a purchaser in good faith from the railroad company to a patent from the government, upon making proof of such purchase within such time as might be prescribed by the secretary of the interior. The case before us does not come within the provisions of any of these sections.

"Appellant claims under section 5, which reads as follows: 'That where any company shall have sold to citizens of the United States * * * * as parts of its grant, lands not conveyed to or for the use of such company, * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.' Provisos in the section except therefrom lands 'in the bona fide occupation of adverse claimants under the pre-emption or homestead laws,' etc., and also 'lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States,' etc. [24 U. S. Stats., p. 556. 129 Cal., pp. 678-679.]"

It may be contended that the second proposition involved in the opinion, to-wit, laches in exercising the right to purchase, would or should control the decision, even as against trespasses or acts committed in August, 1887, after the purchase of plaintiff; but an answer to that is that the second proposition is based upon an entire misconception of the facts and the law. While

the opinion concedes that a bona fide purchaser coming within the 5th section of the Act of March 3, 1887, would, under certain conditions, be entitled to have his interest and title derived under that section quieted, it holds that what it finds to be laches on the part of appellant deprives appellant of that right in the eyes of a court of equity.

The court says:

> "In the case before us, there is no evidence that plaintiff or its predecessors are now or ever were in posssion of the land; there is a finding that Heckenlively, shortly after he entered into the contract with the Southern Pacific Railroad Company, 'did enter upon said land, and commence the construction of a ditch and tunnel thereon,' but there is no evidence as to what part of the land this was or as to the extent of this temporary possession, or how long he remained or what work he did; there is no evidence that plaintiff or any of its predecessors ever applied to purchase the land, or expressed an intention to do so, or that plaintiff now desires to purchase or intends to purchase the land. Its right to purchase accrued, if at all, in 1887. It seems to me conceding that it has not lost this right by its delay to make application to purchase that a court of equity ought not to grant the relief asked upon a mere right to purchase, such as is shown in this case, where it appears that plaintiff and no person under whom it claims was ever in possession of the land; is not now in possession; has never applied to purchase the land, and does not show any intention to purchase it. We think there should be some more tangible right shown than appears here before a court of equity will lend its aid to quiet plaintiff's right, which appears to be nothing more than an option to purchase unaccompanied by any equitable circumstances."
>
> [San Jose Land & Water Co. v. San Jose Ranch Co., 129 Cal., p. 680.]

That appellant should not be held responsible for such supposed laches, will appear from a simple statement of facts of which this court takes judicial cognizance. Until the decision of the United States Supreme Court rendered on the 12th of December, 1892, in the case of the United States v. the Southern Pacific Railroad Company, 146 U. S. R., page 570, it was universally supposed both by the United States Land Department and by the courts in California, United States Federal Courts, and also by the general public that the lands lying in what is now known as the conflicting limits of the A. & P. Co., and the S. P. Co. under its grant of 1871. It therefore must follow, and the fact is, that when this suit was tried in 1890, it was tried by counsel and by the court below on the supposition that the railroad contract was for a tract of land which it had the right to sell, and that appellant's right was based upon the right derived under that contract, and that appellant was in no fault for not making application to purchase prior to December 12, 1892, even if he could have done so.

The court will also take judicial notice of the fact that the land was withdrawn from "sale, location, or pre-emption or homestead" for the benefit of the Southern Pacific Railroad Company—under its grant of 1871—by order of the commissioner of the Land Department, dated April 2, 1871. And that it was not restored to the public domain again until 1898, by letter of the Secretary of the Interior, dated January 18 and 28th, 1898, and that in fact, as shown by the public records of the Land Office in Los Angeles, California, no application to purchase any of said land could be entertained till September, 1898. So it is evident that appellant could be guilty of no laches for not making application to purchase before September, 1898. We will add that as soon as it could do so, ap-

pellant's successors in interest made its application and now has its patent.

The details of the withdrawal for the benefit of the Southern Pacific Company in 1871, are fully stated in said 146 U. S. 570, at pages 601 and 602, and the details of the restoration are fully shown by letter of the United States Land Commissioner to the register and receiver at Los Angeles, dated April 15, 1898.

Another false premise upon which this opinion of the learned commissioner is based is that Heckenlively never entered into possession of the property; and we will add that in our opinion, it is an equally false premise to assume that possession is in any respects essential to the rights of the *bona fide* purchaser under the Act of 1887, in order to entitle him to protect those rights as rights granted by the 5th section of the Act of March 3, 1887. We know of no rule or principle of law which warrants the court in adding a condition which is not prescribed by the statute. In fact, however, the evidence shows and the court finds that Heckenlively, shortly after the purchase by him, entered upon the land and commenced the construction of a ditch and dam thereon, and the evidence shows that he was upon the ground when the defendants were constructing their dam, and twice forbade them proceeding with the work.

Another element which is injected by the learned commissioner as a condition of the assertion by the appellant of its rights is that if it has not made application to purchase, and there was no evidence of an intention to do so. We know of no more forcible expression or evidence of the intention on the part of appellant to assert its claims under the Act of 1887, the only title or claim of title it has, than the continuous prosecution of this action. It is true the suit was originally begun and tried on the assumption that the

railroad grant was valid, and on the theory on the part of plaintiff that the railroad contract conferred the right of possession and an equity title upon it to said land; but after submission of the cause and after the decision of the Supreme Court finally adjudicating that the Southern Pacific Railroad Company had no title under said grant, evidence was introduced showing that Heckenlively and Noland were *bona fide* purchasers from the railroad company, and the lower court found all the facts which would be necessary to prove before the Land Office in order to entitle the appellant to a patent for the land; and we reiterate that the prosecution of this action by the appellant, basing all of its rights to relief under the Act of March 3, 1887, was far more potent evidence of the intention on the part of appellant to exercise its rights than any mere assertion of such intention would be.

Under the circumstances shown by this case where, at the time of the commencement of the action and for more than a year after the case was decided, this land, through action of the Land Department, was withdrawn from entry and no application could be made by the appellant to purchase the same, for this court to hold that no action could be maintained by the purchaser to protect his rights to that property as against trespassers, would establish so harsh a rule that its application in other cases, just as in this, would result in loss of the land or in easements being acquired thereon by adverse parties or users. Under our law, continuous adverse possession for five years bars action and confers title upon the adverse user, and if, as here, the right to apply for patent was withheld for over five years, and the land should be in the adverse possession of some third party, the purchaser from the railroad company would be forced to sit idly by and see such possession ripen into absolute title, he being

powerless under the harsh rule sought to be established by the opinion of the Supreme Court in this case.

We respectfully submit that no rule allowing such injustice or outrage upon a man's right will ever be sanctioned by this court.

W. H. Anderson
Atty for Plff
in Error.

# In the Supreme Court

OF THE

# UNITED STATES.

OCTOBER TERM, 1902.

**The San Jose Land & Water Company,**
*Plaintiff in Error,*
*vs.*
**The San Jose Ranch Company,**
*Defendant in Error.*

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

*The Court has Jurisdiction of This Cause:*

In his argument, the learned counsel for the defendant in error does not contend that there was no federal question involved in the decision of this case by the lower court, but that it was not "set up or claimed" by the plaintiff in error in the court below; and he relies mainly in support of his contention upon the apparent theory that only the pleadings can be considered as part of the record, and that there is no distinction between those cases where the absolute silence of the record as to a federal question renders necessary an inquiry as to whether such a question was or was not necessarily involved, and those in which the record affirmatively shows, though not necessarily in the pleadings, that such a question was directly in-

volved and was the sole question involved and decided.

The court's opinion upon writ of error from the decision of the highest judicial tribunal of the state is part of the record.

Cousin v. Labatere, 19 How., 202; 15 L. Ed. 601;

Murdoch v. Memphis, 20 Wall., 633; 22 L. Ed. 443;

Gross v. U. S. Mtg. Co., 108 U. S., 485; 27 L. Ed. 795;

Philadelphia Fire Ass'n. v. N. Y., 119 U. S. 116; 30 L. Ed. 346;

Creiger v. Shelby Ry. Co., 125 U. S. 44; 31 L. Ed. 678;

Skuder v. Comptroller, 175 U. S. 36.

The jurisdictional test in cases of this character is not that which is claimed by counsel for defendant in error. The true rule is that to bring the federal question for decision to this court, "it must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it and their decision against the right claimed under it."

Maxwell v. Newbold, 59 U. S., 18 How. 15; 15 L. Ed. 506-508;

In Sully v. American National Bank, 178 U. S. 289; 44 L. Ed. 1072, this court said:

> "In regard to the objection that even Cahart has raised the question too late, we think it is without foundation. He raised it in the Supreme Court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the Supreme Court the statute was a valid and constitutional exercise of the legislative powers of the state." [L. Ed., p. 1076].

In Gross v. U. S. Mtg. Co., *supra,* Mr. Justice Harlan, who delivered the opinion of this court, said:

> "The first point to be considered relates to the jurisdiction of this court. In behalf of the defendant in error, it is insisted that it does not appear from the record that the decision of the Supreme Court of Illinois was adverse in asserting the right under the constitution, laws or treaties of the United States, nor that the judgment nor decree complained of could not have been passed without the determination of any special federal question. (Citing authorities). This proposition depends upon the inquiry whether the opinion of the State Court, which is made part of the transcript, can be examined for the purpose of ascertaining the grounds upon which the court based its final decree."
>
> [27 L. Ed. 797].

The court then proceeded to examine the authorities touching upon the question as to its right to consider the decision of the State Court for the purpose of ascertaining what was involved in the controversy, and held that it had the right to so consider it. Upon that consideration it determined that a federal question as involved, and entertained jurisdiction.

In Philadelphia Fire Ass'n. v. N. Y., *supra,* where there were no pleadings, but where the case was submitted upon an agreed statement of facts, the court said:

> "The defendant claims here the benefit of the 14th amendment, and the question has occurred as to whether the record presents that point for our review. There being no pleadings, the obvious place to look for the claim would be the agreed statement of facts, but all that is there said is that the defendant insists that the statute is 'unconstitutional and void, and not a legitimate exercise of power.' The question was considered in both the Supreme Court and the court of ap-

peals as to the validity of the statute under the Constitution of New York as being a law made to depend for its operation on the legislation of a foreign state, and thus an illegitimate exercise of the legislative power. This contention is fairly within the words of the agreed statement, and if it depended wholly on that statement to determine whether the record raises a federal question, some doubt might exist, but in view of what was said in Murdock v. Memphis, 20 Wall. 590-633, in Gross v. U. S. Mtg. Co. 108 U. S. 477, and in Adams Co. v. Burlington & Mo. R. R. Co., 112 U. S. 123, we think that we are at liberty to look into the opinion of the Court of Appeals, a copy of which, duly authenticated by the proper officers, is transmitted to us with the record in compliance with our 8th rule, for the purpose of aiding and determining what was decided by that court."

[30 L. Ed., p. 346].

This was done, and the appeal determined upon its merits.

In the case of Sayward v. Dewey, 158 U. S. 180; 39 L. Ed. 941 and 942, Mr. Chief Justice Fuller, in delivering the opinion of this court, said:

"As the validity of no treaties or statute of or authority exercised under the United States, nor of a statute of or authority exercised under any state was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court and that the decision of the highest court of the state in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed, and in that record certain propositions must be regarded as settled.

"6. The right on which the party relies must have been called to the attention of the court in

some proper way and the decision of the court must have been against the right claimed.

Hoyt v. Thompson, 66 U. S., 1 Black 518;
Maxwell v. Newbold, 59 U. S., 18 How. 515.

"7. Or, at all events, it must appear from the record by clear and necessary intendment that the federal question was directly involved so that the State Court could not have given judgment without deciding it—that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision.

Powell v. Brunswick Co. Board of Supervisors, 150 U. S., 433-439."

This entire question was also pleaded, considered and decided contrary to the contention of counsel for respondent in error in the case of Meyers v. Richmond, 172 U. S., 82; 43 L. Ed., 374.

In the case of Dewey v. Des Moines, 173 U. S., 193; 43 L. Ed., 665-667, this court, while holding that no jurisdiction was shown in the record then before it, very clearly points out all that is necessary to confer jurisdiction. It there said:

"Although no particular form of words is necessary to be used in order that the federal questions may be set up involved within the meaning of the cases on this subject, there yet must be something in the case before the State court which at least would call its attention to the federal question as one that was relied on by the party, and then if the decision of the court while not noticing the question was such that the judgment was by its necessary effect, a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or such was its necessary effect in law. (Citing a number of cases.)

"In all these cases it did appear from the record

> that the rights were set up or claimed in such a way as to bring the subject to the attention of the State court. It is not enough that there may be somewhere hidden in the record a question which if raised would be of a federal nature. * * in order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough; but the denial, whether expressed or implied, must be of some right or claim founded upon the constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below."

From these authorities it clearly appears, and it is the settled rule of this court, that where the record affirmatively shows that a federal question was raised —that is, that it was "set up" or "claimed"—whether that fact is deducible from the pleadings or from the judgment or from any other part of the record, it is sufficient to confer jurisdiction, and it is immaterial where, when, or how, it was raised, provided it was raised prior to the final judgment, and was determined and passed upon adversely in the final judgment.

In the case at bar, the record fully meets the requirements in this regard of the authorities. Waiving the fact that it fully appears from the findings that the plaintiff in error claimed certain rights or privileges under the federal statutes making grants to the Southern Pacific Railroad Company, and that the decision of the lower court was adverse to that claim, it fully and affirmatively and in terms appears from the decision of the Supreme Court of the State of California, found at folios 154 to 164 of the transcript, that the right

claimed and urged and presented in that court by the plaintiff in error was one founded solely upon a federal statute, and that court determined the right adversely to the claim of the plaintiff in error and gave the Federal statute a construction which was adverse to such claim.

Under these circumstances, there can be no question of doubt whatever as to the jurisdiction of this court in the case at bar. The merits of the controversy are fully discussed in our opening brief, and we see nothing in the argument of counsel for the respondent in error upon the merits to necessitate any further presentation of them here.

Respectfully submitted,

W. H. ANDERSON,

*Attorney for Plaintiff in Error.*

# In the Supreme Court

OF THE

# UNITED STATES.

OCTOBER TERM, 1902.

**The San Jose Land & Water Company,**
*Plaintiff in Error,*
*vs.*
**The San Jose Ranch Company,**
*Defendant in Error.*

## BRIEF FOR THE DEFENDANT IN ERROR.

I.

**The court has no jurisdiction of this cause.**

This was a suit under the statute of the state of California, to determine adverse claims to the property involved. The plaintiff's allegation is that it is, and for a long time hitherto has been, the owner of that tract of land, and the defendant claims an estate or interest in the land, adverse to the plaintiff. And the defendant's claim is averred to be without right, etc.

Trans. pp. 1-2.

Of course the complaint does not present any claim of any kind under the constitution or any law of the

United States, nor does the answer raise any such question.

Trans. pp. 2-8.

In the findings of fact the act of March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," is referred to.

Trans., Finding 4, page 5.

And is again referred to,

Findings 6-7, pp. 5-6.

And the act of July 27, 1866, is referred to in finding 9, but only to the extent of stating that the land in controversy is within the indemnity limits of the Alantic & Pacific Railroad Company under that act, and the route designated by the company.

No other act of Congress is referred to in the findings at all The constitution is nowhere mentioned, and, in fact, no question of constitutional law is involved in the case.

Now the jurisdiction of this court upon a writ of error to the highest court of the state, as declared by the act of Congress, is:

1. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity.

But no question is made anywhere in this case of the validity of any treaty or of any statute, or any authority exercised under the United States.

2. Or where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity.

But there is not here drawn in question the validity

of any statute of the state of California, or any authority exercised under the state.

3. Where any title, right, privilege or immunity *is claimed* under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

Revised Statutes, Sec. 709.

Under this provision, if any, the jurisdiction of this case must come. But now it is the settled law of this court that under that provision the claim must be specifically made. And more than that, such right or title must be specially set up or claimed on the record.

Murdock v. Mayor and Aldermen of Memphis, 20 Wal. 590; 22 L. Ed. 429, 444;

Clark v. Pennsylvania, 128 U. S. 395; 32 L. Ed. 487-488.

The arguments of counsel cannot be looked into to show a federal question.

Sayward v. Denny, 158 U. S. 108; 39 L. Ed. 941;

Zadig v. Baldwin, 166 U. S. 485; 41 L. Ed. 1087.

Nor are the assignments of error available to show the federal question, for they are not a part of the record.

Sayward v. Denny, *supra*.

Fowler v. Warren, 164 U. S. 252; 41 L. Ed. 424.

Nor is it sufficient that such a claim appears in the petition for the writ.

Clark v. Pennsylvania, *supra*.

Nor can it be made out by the certificate of the judge.

Caperton v. Ballard, 14 Wal. 216; 20 L. Ed. 885;

Dibble v. Bellingham, etc., 41 L. Ed. 72.

The claim made must be distinct and positive, and not left to mere inference. "Specially set up" means unmistakably, distinctly and positively brought to the attention of the court.

Oxley Stave Co. v. County of Butler, 166 U. S. 648; 41 L. Ed. 1149, 1151;

Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58; 43 L. Ed. 364, 368-369.

A special reference must be made to the particular statute or law of the United States under which the party claims.

Speed v. McCarthy, 181 U. S. 269; 45 L. Ed. 855, 858-859.

This court sometimes takes jurisdiction where it manifestly appears from the record that a federal question was involved, but that is not done when the case comes under the particular provision of the act of Congress which we are now considering.

Eastern Building Association v. Welling, 181 U. S. 47; 45 L. Ed. 739, 741.

At this page, the court said:

> "The assertion that although no federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the constitution of the United States was relied upon, nevertheless that it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a conclusive line of authorities * * * The error involved in the above arises from failure to observe that the particular char-

acter of federal right which is here asserted is embraced within those which the statute requires to be 'specially set up or claimed'. The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially under the latest case cited, the Columbia Water Power Co. vs. Columbia Electric Street R. Light & Power Co."

(The stars above stand for the authorities cited.)

Now, as already stated, in the judgment record in this case consisting of the pleadings, findings of fact and judgment, there is no act of Congress mentioned except certain acts under which it is not pretended that the plaintiff in error does claim.

Whatever rights for which he invokes the protection of any statute of the United States, are rights asserted under the act of March 3, 1887, but that act we say again, does not appear on the judgment record at all, nor does it appear in the only other place that it could have been made to appear in this case, namely, the statement on motion for a new trial. In that statement the only assignments of error, or specifications of errors of law, will be found at pages 19-20 of the transcript. The assignments are as follows:

"The plaintiff now assigns as error on said statement that there is no evidence sustaining the finding that the plaintiff did not own the property described in the complaint, and in the findings of the court. That the evidence clearly showed the fact that the plaintiff and its vendor both purchased the property in good faith, believing the title of the railroad company thereto to be valid, and had taken possession and made improvements upon said property, and expended money thereon in good faith. That under and by virtue of the *laws of the United States* they were entitled to purchase said property when the same came into the market, which right to purchase was good against the whole world, and could not be taken

away from plaintiff, either by a purchaser in good faith or by such trespasses as would deprive plaintiff of its rights by the statutes of limitations. All of which appears by the testimony in the case."

Trans. pp. 19-20.

Plaintiff assigned as further error that the decision and judgment of the court were contrary to the law in this, that it appeared from the undisputed evidence in the case that plaintiff and its vendors were *bona fide* purchasers and in possession of the property, and entitled to purchase the same from the United States government when the same came into the market; yet under this issue, which was material, and supported by abundant evidence to show the facts, the court failed to make any finding at all, and for this reason the plaintiff claims that it is entitled to a new trial in said cause.

Trans. p. 20.

Now this is all that appears upon this record in the nature of a claim made to the protection of any law of the United States. And all there is of that claim is that it was entitled to purchase under and by virtue of the laws of the United States, but no law is specified, and, more than that, it only claimed to be entitled to purchase when the same came in the market. This is not a sufficiently specific claim to the protection of any law of Congress under the authorities above cited. More than that, it does not appear that the decision of this court was at all controlled by any statute of the United States. The plaintiff in error claims under a contract between the Southern Pacific Railroad Company on the one side and W. D. Nolan and Jacob Heckenlively on the other, which was of date the 28th day of February, 1887.

Trans. pp. 6-8, finding 10.

There are three clauses in this contract to which we call attention:

1. They agreed to buy the land for $160, to be paid as follows: $32, and also $8.96, one year's interest in advance on the remainder, in United States gold coin, and the remainder, to wit, the sum of $128, with interest in advance at the rate of seven per cent. per annum, at its office in the city and county of San Francisco, on or before the 28th of February, 1892, and to pay all taxes and assessments that might be levied, etc.

Trans. pp. 6-7, fol. 12.

2. The next clause is that it was further agreed that the parties of the second part might at once enter upon, take and hold possession of such premises, provided, however, that if they failed to make any of such payments of remainder, or interest, taxes or assessments, or should fail to comply strictly with any of the stipulations of the contract, then this right should cease, and the party of the first part, its successors or assigns, might, without notice, enter upon, take and hold possession of said premises.

Trans. p. 7, fol. 13.

3. The third is that it was agreed that the contract should not be assignable except by indorsement, and with the written consent of the party of the first part, and the written promises of the assignee to perform all the undertakings and promises of the party of the second part, as above set forth.

Trans. p. 8, fol. 15.

Now it is found that Nolan and Heckenlively made this first payment and the annual interest had been paid up to February 28, 1892, and no other or further payments of interest or principal have been made.

Finding 11, p. 8, fol. 16.

It is shown, moreover, that neither Nolan and Heckenlively nor any of their assignees ever settled upon the tract or cultivated or fenced the same, or

any part thereof; all that was done was that Heckenlively did, shortly after the contract was executed, enter upon the land and commenced the construction of the ditch and tunnel.

Trans. finding 11, fol. 16, p. 8.

Then follow findings of the assignments, but none of them were ever consented to by the railroad company.

Finding 12, pp. 8-9, fol. 16.

Under these findings, independently of any question arising under the act of 1887, this plaintiff in error had no rights even under the Southern Pacific Railroad Company, and it does not appear, but the court may have so decided.

Furthermore, it is not only necessary to claim a right under the statute, but it must equally appear that that claim was denied. But it does not so appear. All that the plaintiff in error could claim under the act of 1887, even if it had made this specific claim, was the right to purchase the land, for that is all the right the act gives to a *bona fide* purchaser.

It will be observed that the statute of March 3, 1887, provides for two different classes of cases:

Section 4 provides for cases where a patent has been issued to the railroad company. In that case the purchaser, by making proof of the fact of such purchase, becomes entitled to a patent from the United States therefor, and when issued it relates back to the date of the original certification or patenting.

24 Stats. at L., p. 557, Sec. 4.

In this case no patent had issued, and the case then falls, if anywhere, under the 5th section, which simply declares that where the company has sold to citizens of the United States or persons who have declared their intention to become such, as a part of its

grant lands not conveyed, to or for the use of the company, etc., it shall be lawful for a *bona fide* purchaser thereof from such company to pay for it at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns.

24 Stats. at L., Sec. 5, p. 557.

That section does not provide that when the purchase is made and the patent issues it relates back to anything.

Now the court did not decide that the plaintiff in error had not this right to purchase. The point of the decision upon this question is that whether it had or not, it had not exercised it. It had neither purchased nor made any offer to purchase, and the lands belonged to the United States government, and the plaintiff in error could not, by any just interpretation of the statute, be entitled to all the rights in the land without purchasing or offering to purchase that it would have if it had purchased and paid for the land and obtained the patent.

It is submitted, therefore, that no right was specially claimed, or set up under any statute of the United States, nor was there any decision denying such right, and therefore the judgment should be affirmed or the writ dismissed.

II.

The plaintiff had no title under the facts as found in this case. Upon this subject it is doubtless sufficient to refer to the opinion of the Supreme Court of California, which will be found in the transcript, pages 28-33, and the authorities cited.

129 Cal. 673.

But we may remark further, that even if it were true that any "inceptive right" was acquired under the fifth section by a *bona fide* purchase of the tract of

land from the Southern Pacific Railroad Company, and the plaintiff in error or its assignors were such *bona fide* purchasers, or that either of them had complied with the contract of purchase with the Southern Pacific Railroad Company; in other words, if all the rights given by the fifth section existed in their case this "inceptive right," to be available, must be connected with something more than an inceptive right. The inceptive right cannot be both inceptive and final. The proof of this *bona fide* purchase must be made to the Land Department, and, being made, the land must be paid for, and having been paid for, the patent will issue. But in this case no more than any other law for the disposition of the public lands, does any right accrue until the proof and payment are made. If it were otherwise, the plaintiff in error need never do anything. The statute doesn't seem to fix any limitation of time within which this right to purchase is to be exercised, and, according to its theory, it need never have anything but an inceptive right.

Sturr v. Beck was a totally different case. There an entry had been made under the homestead law, and they had thereby become vested with a title, not perfect, to be sure, but still a title.

Neither does the decision in St. Paul & Pacific Railroad Company v. The Northern Pacific Railroad Company, 139 U. S., p. 1, prove anything in favor of the plaintiff here. After withdrawal, it is said there, no interest in the land granted can be acquired against the rights of the company. But here the Southern Pacific Company never had any rights, and they were never withdrawn in the interest of that company, but the Atlantic & Pacific, under which the plaintiff in error here, does not claim. All persons being citizens or having filed their declarations of intention to become such, could enter lands under the homestead laws, but this does not give them a right until they

exercise that privilege. So here there is the right of this *bona fide* purchaser from the railroad company to purchase from the United States, but there is nothing in the act which makes it obligatory upon him to do so, and to say that neither the United States nor anybody else has any such interest in these lands, or can acquire any, whereby they can have any right or control over it at all, simply because one has a right to purchase who has never taken any step to exercise that right, nor shown any disposition to do so, is, we say again, to make it entirely unnecessary that he should ever purchase. A large number of cases are cited in the brief from the decisions of the Land Department, but they are only to the effect that a *bona fide* purchaser from the railroad company has the right to purchase from the United States; but that the statute says, and nobody has ever denied it in this case.

And it is respectfully submitted that if the court has any jurisdiction, the judgment should be affirmed on the merits.

JOHN S. CHAPMAN,
*Attorney for Defendant in Error.*

# Supreme Court of the United States.

No. 113.—October Term, 1902.

The San Jose Land and Water Company, Plaintiff in Error, *vs.* The San Jose Ranch Company. } In error to the Supreme Court of the State of California.

[March 2, 1903.]

This was an action brought in 1889 by the Land and Water Company, under the Code of Civil Procedure of California, to quiet the title of the plaintiff and determine the nature of the adverse claim of the defendant, to the half of a quarter section of land, which had been sold by the Southern Pacific Railroad Company February 28, 1887, to plaintiff's predecessors in title as part of its land grant of 1871.

The case was tried in 1890, though the decree was not entered until 1897. The facts found by the court were substantially that the Southern Pacific Railroad Company had accepted the benefit of a land grant made March 3, 1871, to the Texas and Pacific Railroad, filed its map of location April 3, 1871, and on August 12, 1873, formed a new corporation, also known as the Southern Pacific Railroad Company; built and constructed a road from Tehachapi Pass by way of Los Angeles to Yuma, and selected the land in question under the act of March 3, 1871; that such land was within the place limits of the Southern Pacific, and also within the indemnity limits of a land grant to the Atlantic and Pacific Railroad by act of July 27, 1866. This latter company never complied with the terms of the grant and never built its road.

That on February 28, 1887, the Southern Pacific agreed with two parties named Nolan and Heckenlively to sell them this land, and after the receipt of the United States of a patent therefor, to deliver them a deed; that by subsequent conveyances, and on August 29, 1888, the right of the grantees became vested in the plaintiff, the San Jose Land and Water Company; that the land is situated in San Dimas Canyon, through a portion of which the San Dimas Creek flows; that prior to December, 1883, one Stowell claimed to own a water right in the waters flowing down such creek, the character and extent of which the court did not adjudicate, and about that time entered upon the land and constructed across a portion of it a twelve-inch pipe line for the purpose of conducting the water so claimed by him from its point of diversion across said lands to other lands; that prior to July, 1887, the San Jose Ranch Company, defendant, had, by mesne conveyances, succeeded to the rights of Stowell, and also constructed upon such land, at a point where the waters of San

Dimas Creek flowed, a brick and cement forebay, sand box or dam, and laid therefrom across a portion of said land a fourteen-inch pipe line, both of which pipe lines it claims the right to maintain, but makes no other claim of right to such lands.

Upon this state of facts the Superior Court entered a judgment in favor of the defendant, which was affirmed by the Supreme Court. (129 Cal. 673.) Whereupon the plaintiff sued out this writ of error.

Mr. Justice BROWN delivered the opinion of the Court.

Motion is made to dismiss this writ of error upon the ground that no Federal right, title, privilege or immunity was "specially set up or claimed" by the plaintiff in error, as required by the third clause of R. S., sec. 709. None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial and in the assignments of error in the State Supreme Court. It also appears from the opinion of the court that plaintiff relied upon the act of Congress of March 3, 1887, for the readjustment of land grants, (24 Stat. 556,) and the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of that act. This question was fully considered by the court, and it was held that the defendant, having acquired its rights prior to the act of 1887, must prevail against the right claimed by the plaintiff.

While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court, requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed," that it was fully considered in the opinion of the court and ruled against the plaintiff in error. (*Murdock* v. *Memphis*, 20 Wall. 590, 633; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 115; *Egan* v. *Hart*, 165 U. S. 188; *Sayward* v. *Denny*, 158 U. S. 180, 184; *Mallett* v. *North Carolina*, 181 U. S. 589.) These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases, (*Williams* v. *Norris*, 12 Wheat. 117; *Rector* v. *Ashley*, 6 Wall. 142, and *Gibson* v. *Choteau*, 8 Wall. 314,) in which we held that the opinion of the State court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided.

2. The case upon the merits presents but little difficulty. The action is brought under sec. 738 of the Code of Civil Procedure of California, which provides that "an action may be brought by any person against

another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The land in question was within the indemnity limits of the land grant of July 26, 1866, (14 Stat, 292,) to the Atlantic and Pacific Railroad Company. Plaintiff, however, claims nothing under this grant, as the railroad company never complied with its terms; never built its road, and the grant was forfeited by act of July 6, 1886, (24 Stat. 123,) and the land restored to the public domain. The act, however, becomes pertinent in another connection.

The land in question was also within the place limits of the grant to the Texas and Pacific Railroad Company by act of March 3, 1871, (16 Stat. 573,) and subsequently became vested in the Southern Pacific, which constructed the road and selected the land in question, claiming it under that act.

It was held by this court, however, in the *United States* v. *Southern Pacific Railroad Company*, (146 U. S. 570,) that the forfeiture of the Atlantic and Pacific grant of July, 6, 1886, did not enure to the benefit of the Southern Pacific, which held the later grant of the same land, but to the benefit of the United States, and thereby became a part of their public lands. In the next following case, *United States* v. *Colton Marble & Lime Co.*, (146 U. S. 615,) this ruling was extended to the indemnity lands of the Atlantic and Pacific, which, upon forfeiture of its land grant, also reverted to the United States.

Hence on February 28, 1887, when the Southern Pacific Company contracted to sell these lands to Nolan and Heckenlively, it had really nothing to sell, and no interest in the land that could pass under that agreement. There was a stipulation in it to make a deed of the premises as soon as the railroad had received a patent therefor from the United States; that it would use ordinary diligence to procure such patent, and that, if in consequence of circumstances beyond its control, it failed to obtain a patent, it guaranteed nothing with regard to the title, but agreed to repay everything which had been paid by the grantees. There was a further agreement that the contract should not be assignable except by endorsement, and with the written consent of the company, and a written promise of the assignee to perform all the undertakings and promises of the grantees.

After making the first payment and paying the annual interest to February 28, 1892, the grantees ceased all further payments. The findings show that at the time of the execution of the contract, "said tract of land was not in the *bona fide* occupation of any adverse claimant under the pre-emption or homestead laws of the United States, and the same had not been settled upon at the date of such purchase, or on the 3d day of March, 1887, or subsequent to December 1, 1882, by any person claiming

to enter the same under the settlement laws of the United States." That neither the grantees nor their assigns ever settled upon the land, cultivated or fenced it, although Heckenlively did, shortly after the purchase, enter upon the land and begin the construction of a ditch and tunnel thereon. Subsequently the land passed by intermediate conveyances to the plaintiff. Manifestly, however, there was a clear failure of title on the part of the plaintiff to maintain this action. The Southern Pacific had no title to convey, and beyond this there is no finding that the contract was assigned by endorsement or with the written consent of the railroad company, or that there was any promise on the part of the assignees to perform the undertakings of the original grantees.

Plaintiff's claim to the land must rest, if at all, upon the act of Congress of March 3, 1887, (24 Stat. 556,) entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes"—the main purpose of which act was to relieve *bona fide* purchasers from railway companies of forfeited lands, by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. By section 5 of this act, "where any company shall have sold to citizens of the United States . . . as parts of its grant, lands not conveyed to or for the use of such company, . . . and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands, at the ordinary government price for like lands, and thereupon patent shall issue therefor to said *bona fide* purchaser, his heirs or assigns." The section, however, contained provisos excepting from its terms all lands which at the date of such sales from the government were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws, and also of lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States.

There are two difficulties connected with the application of this statute: (1) Assuming that Nolan and Heckenlively were *bona fide* purchasers in good faith from the government, which indeed is a part of the finding, there is nothing to indicate that they had ever made payment to the United States for the lands, or ever applied to do so; nor does a patent ever appear to have been issued to them. In short, the plaintiff relies upon the statute without showing that anything was done under it. (2) The provisions of this section do not apply to lands occupied adversely under the pre-emption, homestead or settlement laws of the United States, and the finding in this connection is that in 1883 one Stowell owned, or claimed to own, a certain water right in the waters of San Dimas Creek,

which flowed through a portion of the land, the character and extent of which water right the court did not find, and that in November of that year Stowell entered on the land, laid and constructed across a portion of it a twelve-inch pipe line for the purpose of taking the water across the land to other lands, probably for the purposes of irrigation; and that in July, 1887, the defendant, which had by mesne conveyances succeeded to this water right of Stowell, entered upon the land and built and constructed thereon a stone, brick and cement forebay, sand box or dam, and also a fourteen-inch pipe line across a portion of the lands. It still claims the right to these improvements, but makes no other claim of right, title or interest to the land or any part thereof.

The record does not show exactly how Stowell obtained his rights to the waters of this creek, although the testimony sent up with the record indicates that one Haynes settled upon the land in question in 1869, and obtained a patent either in August or September, 1878; that he used the water from the creek to irrigate the land; made a dam and a ditch and ran it down to the ranch; that he began using the water in March, 1870, and so used it up to the spring of 1878, when he obtained the patent, sold to Stowell, and conveyed the land by deed.

Conceding, however, that, under the findings, we cannot look back of 1883, when Stowell entered the land and laid a twelve-inch pipe line there, under a claim of ownership of the water right, we see no reason why he and his grantees are not protected by section 9 of the act of July 26, 1866, (14 Stat. 251,) which declares that, "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

Bearing in mind that these lands were from July 6, 1886, the date of the forfeiture, public lands, subject to the pre-emption, homestead or settlement laws, and that at the time Stowell entered upon the land, and constructed a pipe line thereon, (1883,) which at that time seems to have been wholly unoccupied, we think the fact that Heckenlively, under his agreement of purchase of February 28, 1887, and shortly after the same was executed, entered upon the land and began the construction of a ditch and tunnel there, becomes immaterial, since there is a finding that he never settled upon the land, cultivated or fenced it, or took possession of it, and no finding how long he continued the construction of the ditch or tunnel, or the amount of work in connection therewith. For aught that appears he may have abandoned it immediately. There is no evidence that the

original grantees from the railroad company, or their successors in interest, ever sought to take advantage of the act of 1887, or ever applied to purchase the lands, or made payment to the United States, or did anything whatever before the beginning of this suit to indicate that they relied upon this statute. We agree with the Supreme Court of California that the plaintiff was not entitled, upon the showing of a mere right to purchase, to demand that its title be adjudged good and valid, and that the defendant had no estate or interest in the land, or that it should be enjoined from asserting any claim adverse to the plaintiff, or that it should recover possession of the land, with the right of ousting the defendant from the improvements which its predecessors had made thereon.

An inceptive right under the statute was an insufficient basis of recovery. A party cannot rest forever on such a right, but is required by the statute, before asserting it against innocent third parties, to take some steps to perfect it. The litigation seems to turn really upon the respective rights of the parties to the waters of San Dimas Creek, and as defendant's predecessors first appropriated them, and the plaintiff shows no superior title, it cannot prevail against the Ranch Company. In view of the uncertain character of the finding that Heckenlively did, shortly after his purchase, enter upon the land and commence the construction of a ditch and tunnel thereon, we are unable to see how the case is affected by the fact that, in July and August of the same year, the defendant entered upon the land and constructed their forebay or dam, and laid a fourteen-inch pipe in addition to the twelve-inch pipe which Stowell had laid in 1883. We express no opinion as to the possibility of the plaintiff maintaining a second action upon its patent since obtained or how far this case may, if at all, operate as *res adjudicata* in that.

There was no error in the decree of the Supreme Court, and it is therefore

*Affirmed.*

Mr. Justice McKenna took no part in the disposition of this case.

True copy.

Test:

*Clerk Supreme Court, U. S.*